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SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM 1916

No. 264

UNITED STATES OF AMERICA, *EX REL.* THE STATE OF LOUISIANA, PETITIONER,

vs.

HONORABLE ALECK BOARMAN, JUDGE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT

This cause is brought to this court on writ of *certiorari* heretofore granted by this court, directing the United States Circuit Court of Appeals for the Fifth Circuit to certify to this court for its review a suit in which the United States ex rel. the State of Louisiana was petitioner, and the Hon. Aleck Boarman, then Judge of the United States District Court for the Western District of Louisiana, was respondent. The writ of *certiorari* was sought in order to review the de-

cision of the Circuit Court of Appeals entered on October 29, 1914, in said cause, denying petitioner's application for writs of *mandamus* and *certiorari* to compel the Judge of said United States District Court to allow a petition of intervention to be filed by the State of Louisiana and to grant to the State an appeal to said Circuit Court of Appeals from a final decree entered in the United States District Court for the Western District of Louisiana on October 21, 1913, in the case entitled "BOARD OF LEVEE COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT VS. TENSAS-DELTA LAND COMPANY, LIMITED."

The following statement of facts will show the questions now presented to this court for its decision:

STATEMENT OF FACTS

1. The "Board of Levee Commissioners of the Tensas Basin Levee District" was, by various acts of the Louisiana Legislature (Act No. 26 of 1884, Act No. 59 of 1886, and Act No. 77 of 1888) "constituted and created a body politic, with corporate powers to sue and be sued in their corporate capacity, to have a seal, to levy taxes and assessments, and to issue and sell its corporate bonds." The purpose of the corporation was to develop, establish and complete, either within or without the State, a system of levees and other works of public improvement designed to aid in protecting from floods and over-flows property in the Tensas-Basin Levee District, composed of certain parishes situated in the Basin of the Tensas River. Warrant for this legislative action is found in Article 214 of the Louisiana Constitution of 1879.

2. It was provided by Act No. 77 of 1888 that "in order to provide additional means to carry out the purposes of the corporation," all the lands then or thereafter owned by the State within the district, both those granted to the State by the United States, and those forfeited to the State for non-payment of taxes "*are hereby given, granted, bargained, donated, conveyed and delivered*" unto said Board. The Auditor and Register of the State Land Office were required,

> "*On behalf of and in the name of the State, to convey to said Board of Levee Commissioners, by proper instrument of conveyance,* the lands hereby granted or intended to be granted and conveyed to said board, whenever from

time to time said Auditor and said Register of the Land Office, or either of them, shall be requested to do so by said Board of Levee Commissioners or by the president thereof; and thereafter said president of said Board shall cause said conveyances to be properly recorded in the Recorder's office of the respective parishes wherein said lands are or may be located, and when said conveyances are so recorded the title to said lands with the possession thereof, *shall from thenceforth vest absolutely in said Board of Levee Commissioners, its successors or grantees.* * * * Said Board of Levee Commissioners shall have the *power and authority to sell, mortgage, pledge, or otherwise dispose of said lands in such manner and at such times and for such prices as to said Board shall seem proper.*"

3. The lands thus conveyed to the Levee Board consisted, on the face of the record, of 885,040.31 acres (R. 138). But a great part of the lands was held by the State as forfeited to it for taxes. Many of these lands had been redeemed, and the Levee Board had no title, or the same were conveyed by duplicate, triplicate or quadruplicate descriptions, or previous conveyances thereof had been made by the Levee Board, so that the Levee Board had title to a much less quantity of lands than shown on the face of the deeds to it. In the sworn answer filed by the Tensas-Delta Land Company, Limited, in this cause, it appears that the Levee Board took title to only 580,000 acres of the lands thus conveyed, and of these more than 20,000 acres were absolutely worthless. (R. 138.)

4. In November, 1898, ten years after the grant was made, the Levee Board, having tried in vain to sell these lands for fifty cents an acre (R. 136, 139), sold *without any warranty* whatever, the lands it had received from the State, to the Tensas-Delta Land Company, Limited, a Michigan limited partnership association composed of nonresidents of Louisiana, (R. 137-138). The sale was for $130,000, of which $30,000 was paid in cash and the balance in notes for one, two or three years, with interest at six per cent. per annum (R. 137, 134), all of which notes were duly paid by the company (R. 134). Lands of that character—swamp and over-flowed lands—were then selling in Louisiana at from ten cents to twenty-five cents per acre (R. 139),

and the price paid by the Tensas-Delta Land Company, Limited, to the Levee Board, was approximately 22.4 cents per acre (R. 136).

5. On November 6, 1909, *eleven years after the sale was made, and after the lands had become valuable because of the growth of the country, and after the building of levees with funds obtained from the sale of the lands and from the large special taxes and assessments levied upon them by the Tensas-Basin Levee District, and after eight of the persons connected with the transaction were dead,* the State of Louisiana brought suit in her own courts to set this sale aside and to recover the unsold lands and the proceeds of the lands sold.

The grounds of this action were that the sale was brought about by fraud and inferential bribery; that if the sale was not fraudulent it was a disguised donation; and if not a disguised donation, it was annulable for *lesion beyond moiety.*

To this action defendant pleaded that the State was without interest and could not maintain the action. This plea was sustained and the suit dismissed. The State appealed to the Supreme Court of Louisiana, which affirmed the judgment of dismissal. Application for re-hearing was made and denied.

This case is reported STATE vs. TENSAS-DELTA LAND COMPANY, LIMITED, 126 LA., 59.

6. After the above decision became final, the Board of Levee Commissioners of the Tensas-Basin Levee District, on July 14, 1910, adopted a resolution directing its attorney, M. C. Thompson, to bring suit in its name to recover these lands, and to get into communication with the Attorney General, and, with him, to prepare, file and prosecute said suit, (R. 102-103).

After this action had been taken by the Levee Board, the Legislature adopted Act No. 3 of the Extra Session of 1910, approved August 19, 1910, which provides that:

> "It is hereby made the duty of the Attorney General of the State, upon the request of the Governor, to represent the State, or any political agency or sub-division thereof, in any suit in any court involving title to any land or real property belonging to the State of Louisiana, or any of its political agencies or sub-divisions, whether the title to said land or real property is vested in or

appears in the name of the State, or in the name of any of its political agencies or subdivisions."

Acting upon this statute, the Governor, on January 4, 1911, directed the Attorney General to institute suit for the recovery of these lands "*for the use and benefit of and in the name of the Tensas-Basin Levee Board.*" (R. 102).

7. On September 15, 1911, the Tensas-Basin Levee District, appearing by its attorney, M. C. Thompson, under the above mentioned resolution of July 14, 1910, and also by the Attorney General under the above mentioned instructions of the Governor, instituted suit in the State Court of Ouachita Parish, to set aside the sale of November 4, 1898, and to recover the unsold lands and the proceeds of the lands sold. The averments of the petition in this case were the same as those in the petition in the action dismissed by the State Supreme Court (R. 91-102).

The defendants, being all citizens of States other than Louisiana, removed the cause into the United States District Court for the Western District of Louisiana (R. 104-107), filed the record there, and took a rule on plaintiff to reform its pleadings into a bill in equity, in conformity to the rules prescribed by the Supreme Court of the United States (R. 107-109). Plaintiff acquiesced in this rule and got an order permitting it to file a supplemental and amended bill (R. 110-111). The reformed pleadings and the supplemental and amended bill were filed as one proceeding (R. 111-128).

This new bill was largely taken up with correcting and modifying the averments of the original petition, particularly those as to the participation of the Levee Board itself in the alleged fraud, and those as to the value of the lands (R. 111-128). The original petition valued the lands unsold by the Tensas-Delta Land Company, Limited, at $10 per acre (R. 100), and the amended bill valued the same at $4 per acre (R. 123).

8. The Tensas-Delta Land Company, Limited, insisted that the bill was utterly defective and without equity:

First.—Because the action, being barred on the face of the bill by the limitation of ten years, it contained no averments to take the case out of the operation of the statute, except the bare statement that the Board did not discover the fraud until October 13, 1909, eleven years after it was charged to have been perpetrated.

Second.—Because it did not offer to do equity by returning the purchase price of the lands, with interest, nor the large amount of taxes levied and collected on the lands, nor the costs and expenses of selling the lands, nor the costs and expenses of preserving and guarding the lands from trespassers.

Third.—Because it sued to recover the purchase price of the lands sold, and declined to ratify the sales so made.

Fourth.—Because, so far as it sought to annul the sale as a disguised donation (on its face an absurd averment), it was barred by the statute of limitation of ten years.

Fifth.—Because, so far as it sought to set aside the sale for *lesion beyond moiety*, it was barred by the statute of limitation of four years.

The defendant filed general and special demurrers setting up the above grounds (R. 129-130), and, inasmuch as the bill charged fraud, the defendant also filed an answer in support of the demurrers, denying every averment in the bill charging fraud and conspiracy, and every averment from which fraud could be inferred, and setting up the true facts, (R. 131-141). This answer was filed to fortify the demurrers, and was filed in compliance with the practice in the Fifth Circuit, as declared in Johnson vs. Forsyth Mercantile Company, 127 Fed., 845, such being understood to be the general rule of equity practice in cases where fraud is charged in the bill, though specifically required by the Equity Rules of the United States Supreme Court only in the case of a plea.

9. These demurrers were set down for argument, were argued and submitted.

On the day fixed for the decision of the case, the complainant appeared and asked leave to file a *second* amended bill. The court, considering that the proffered amendments did not make the bill good, refused the proffered amendments and entered a decree dismissing the bill (R. 163). It was directed by the court, however, that the then tendered amendments be filed in the record to show what said tendered amendments were (R. 163).

From this decree the Levee Board appealed to the United States Circuit Court of Appeals, taking this appeal only fifteen days before the time allowed for appeal would expire (R. 172).

In the Circuit Court of Appeals it was insisted by the Tensas-Delta Land Company, Limited, that the proffered

amendments did not make the bill good, and in support of this contention its counsel relied on a long line of decisions, stretching from STEARNS vs. PAGE, 7 How. 819, through WOOD vs. CARPENTER, 101 U. S., 135; NATIONAL BANK vs. CARPENTER, 101 U. S., 567, to WODENSAC vs. REIHER, 115 U. S., 102; HAMMOND vs. HOPKINS, 143 U. S., 274; FELIX vs. PATRICK, 145 U. S., 332; FOSTER vs. R. R. Co., 146 U. S.,88; BOONE vs. BURLINGTON R. R., 139 U. S., 693; HARDT vs. HEIDWEYER, 152 U. S., 559.

The Circuit Court of Appeals, however, reversed the decision of the District Judge and held that the proffered amendments would make the bill a good bill (R. 41-50).

10. The cause was remanded to the District Court allowing the defendant twenty days to answer (R. 51). On account of the great amount of detail work necessary for the preparation of answer, the defendant obtained a delay until rule day in August, 1913, to file its answer to the amended bill (R. 52-54). What occurred subsequent to the remanding of the cause to the District Court is shown in Judge Boarman's return to the order to show cause subsequently issued out of the Circuit Court of Appeals. That return is found in the record, pages 24 to 37 inclusive.

11. On July 11, 1913, the Board of Levee Commissioners of the Tensas-Basin Levee District, by proper resolution, tendered to the defendant a compromise of this litigation, upon the condition that the defendant should pay the Board the sum of $100,000. This proposition was accepted, and on the same day the parties appeared before a notary and executed a formal act of compromise, the $100,000 being paid by a ten day draft, which draft was paid at maturity, and the proceeds deposited in the Treasury of the State of Louisiana, to the credit of the Tensas-Basin Levee District Fund (R. 24, 64-65).

The compromise was in the form of a Notarial Act, duly passed before the Clerk of the Seventh Judicial District Court, in and for the Parish of Richland. In the Notarial Act it is, among other things, set forth that the same is executed in behalf of the Levee Board, by T. B. Gilbert, Sr., its President, pursuant to a resolution of said Board, adopted in regular session, on July 11, 1913. A certified copy of said resolution being attached to the act of compromise (R. 56-60).

By this act of compromise (R. 56-57), which both parties declared they preferred to the hope of gaining balanced by the fear of losing in the litigation between them in the United States District Court, in cause 694 of its docket styled BOARD OF LEVEE COMMISSIONERS OF THE TENSAS-BASIN LEVEE DISTRICT VS. TENSAS-DELTA LAND COMPANY, LIMITED, they agreed to forever end and set at rest all matters and things set up and contained in the original and amended bills of complaint in said cause, and to forever set at rest all questions relating to the validity of the title of the Tensas-Delta Land Company, Limited, to the lands purchased by the latter in November, 1898. In consideration of the payment, the Levee Board agreed to dismiss the litigation at its cost, and it ratified and confirmed the title of the Tensas-Delta Land Company, Limited, to the lands described in the deeds executed by the Levee Board to the Land Company on November 9 1898. The compromise further ratified, confirmed and approved a previous compromise made between the parties on July 9, 1903 (R. 57).

12. On July 19, 1913, the execution of the Notarial Act of compromise, and the payment of the price thereof, were suggested to the court by the defendant, and a motion made that the Levee Board and R. G. Pleasant, Attorney General of the State of Louisiana, attorney of record for complainant, show cause, on a day named, why the suit should not be dismissed at the cost of complainant, and praying that, until the motion could be heard, all further proceedings in the cause be stayed (R. 54-55).

The court issued an order to show cause, returnable on the first day of the next term of the court at Monroe, to be holden in October (R. 55). On the same day the rule was filed, the Secretary of the Levee Board, under the Board's direction, addressed a letter to the Attorney General, as counsel of record for the Board, requesting him to dismiss the case in accordance with the compromise, a copy of which had been transmitted to him on the 14th (R. 70-71). The Attorney General apparently declined to obey the instructions of his client. Consequently, the Levee Board, through its President, T. B. Gilbert, Sr., on August 5, filed an answer to this order to show cause (R. 61). This answer admitted the settlement of the suit and the payment of the amount named in the act of compromise, it affirmed the act of compromise and consented to the final dismissal of the cause

(R. 61) This action of the President was ratified by a formal resolution of the Board, adopted October 9, 1913, (R. 73).

13. The Attorney General also made answer to the rule to show cause. This answer did not purport to be in the name or behalf of the State of Louisiana. It is signed "R. G. Pleasant, Attorney General State of Louisiana,, and attorney of record for complainant," (R. 62-63). In his answer the Attorney General objected to the dismissal of the suit and assigned four grounds in opposition thereto, which, as will be seen from the transcript, are, in substance, as follows:

First.—That the suit was based upon a fraudulent sale of lands and that the fraud vitiated the contract of sale.

Second.—That a fraudulent sale of public lands cannot be ratified and approved by a subsequent agreement between the vendor and the vendee.

Third.—That complainant should not be permitted to use the court and its processes for the purpose of condoning and compromising fraud for money.

Fourth.—That the Attorney General cannot dismiss the suit without express authority from the Governor of the State of Louisiana, for the reason that his right to represent complainant and prosecute the suit is conferred upon him by the Governor under the provisions of Act No. 3 of the Extra Session of the General Assembly for the year 1910.

In stating the second point so made in his answer, the Attorney General says that the only point in dispute between the parties was the question of fraud, all others having been abandoned during the progress of the cause, as shown in the judgment of the Circuit Court of Appeals, and by the admission of complainant's (defendants) counsel in open court, (R. 62-63). This statement is without foundation in fact. Counsel for defendant abandoned nothing but the plea of prescription of one year. The plea of prescription of ten years still remains. Complainant will have to prove all its averments to escape the operation of this limitation. Moreover, every averment in the bill, from which fraud could be inferred, was denied by defendant under oath (R. 131-141). The decision of the Circuit Court of Appeals upon the demurrer was based upon the facts appearing upon the face of the supplemental and amended bill and the amendments proffered. In its opinion the Circuit Court of Appeals, said:

"In deciding the questions raised by the demurrers, we have assumed, as required by the rule, that the averments of fact in the bill are true. If the cause comes to trial on the merits, the defendant will not be prejudiced by what we have said should the evidence show a different state of facts from that alleged." (R. 50).

14. The Attorney General did not appear on the first day of the October term of the United States District Court, to support his objections. Judge Boarman returns that for that reason he deferred the hearing to the next day and caused a telegram to be sent to the Attorney General, in order to give him full opportunity to be present and heard upon the motion to dismiss the suit (R. 25). Still the Attorney General did not appear. The compromise was proved by evidence adduced in open court. The payment of $100,000 into the State Treasury was shown (R. 64-74) and brief was filed by defendant in support of the motion to dismiss (R. 74-86), and, for reasons given by the Judge, the order was entered on October 21, 1913, dismissing the cause as asked for, both by the complainant and the defendant, (R. 86-87).

15. Nothing was heard from the Attorney General until April 6, 1914, when he appeared before the court and asked leave to file a petition of intervention and appeal from the decree of October 21, 1913, dismissing the suit, and an assignment of errors in behalf of the State (R. 27). The decree of dismissal had become final by the adjournment of the court for the term, and the time for appeal had elapsed within a margin of fifteen days, when the State, claiming to be aggrieved by the decree of dismissal, made the application to intervene and appeal (R. 5-10). The District Judge refused both the application to intervene and the application for an appeal.

16. Thereupon the State made application to the United States Circuit Court of Appeals for the Fifth Circuit, for writs of *mandamus* and *certiorari* (R. 1-17) The Court of Appeals ordered the District Judge to show cause why the writs should not issue (R. 23). Judge Boarman made a full and detailed return, setting forth the facts upon which his action was based, and giving his reasons therefor (R. 24-37). The reasons for the action of the District Judge in

refusing to allow the intervention and appeal are stated by him in his return as follows:

First —The State of Louisiana is without legal interest in the subject-matter of this suit, and has no authority in its own name or right to carry on the litigation, and it was so specifically held by the Supreme Court of Louisiana in the cause entitled State vs. Tensas-Delta Land Company, Limited, reported in 126 La., 59.

Second.—Inasmuch as the State of Louisiana was not a party to the suit, it had no appealable interest or standing in a court of equity to ask for an appeal, even admitting, *arguendo*, that it had the same time within which to appeal as that possessed by a party to the suit.

Third.—The petition of the Honorable Attorney General, asking leave, in the name of the State of Louisiana, to intervene in the cause, was one which, in my opinion, appealed to my discretion as Chancellor, and in the exercise of that discretion I deemed it best to deny the petition, and this in particular in view of the fact that the State had already had its day in court and had been adjudged by the highest Court of its own sovereignty to be devoid of legal interest in the subject-matter of the litigation. The intervention being denied, it followed, in my opinion, as a logical consequence, that no right to appeal existed and appeal was also denied.

Fourth.—Independent of the previous decision of the State Court in the case in the 126th Louisiana, it is my view that the merely general nature and character of the interest alleged by the State in the subject-matter of the litigation are not such as to entitle the State to appeal from the decree of dismissal of October 21, 1913, especially in view of the fact that such decree is based upon the consent of both parties to the record and the good faith of the members of the Levee Board in making the compromise is not questioned.

Fifth.—The Honorable Attorney General of Louisiana did not show any authority to apply for leave to intervene or appeal, other than as arises from his office as Attorney General or his position as solicitor and of counsel for the Levee Board in the suit pending in said District Court; and, in my opinion, there existed in him no right or authority in either capacity to carry on

the litigation or appeal the cause contrary to the wishes and best judgment of his client, the Board of Levee Commissioners of the Tensas-Basin Levee District, which, for a valuable consideration, and upon mature deliberation, had seen fit voluntarily to compromise the same. (R. 27-28).

In paragraph X of his return the District Judge adds:

"For the reasons already stated, I am of opinion that the petitioner has no paramount and superior right as a sovereign State to intervene in said suit No. 694, and that it is not entitled, as a matter of law or equity, to appeal to this Honorable Court from said decree of October 21, 1913, ratifying said compromise, as aforesaid." (R. p. 28.)

17. After full hearing, the United States Circuit Court of Appeals, on October 29, 1914, denied both writs, giving its reasons as follows (R. 88-89):

"1. Under the decision of the Supreme Court of the State of Louisiana, reported in STATE vs. TENSAS-DELTA LAND COMPANY, LIMITED, 126 La., 59, the Supreme Court of the State, on full consideration, decided that the State was without real or beneficial interest in the lands in controversy, and this decision is controlling in this court.

"2. One who is not a party to a record and judgment is not entitled to an appeal therefrom. (BAYARD vs. LOMBARD, 9 How., 530; INDIANA vs. LIVERPOOL & LONDON & GLOBE INS. Co., 109 U. S., 168; *Ex-parte* COCKROFT, 104 U. S., 578; *Ex-parte* IN THE MATTER OF LEAF TOBACCO BOARD OF TRADE OF THE CITY OF NEW YORK PETITIONER, 222 U.S., 578, 581)."

It is this decision which the State now seeks to overthrow in this court.

I.

SECTION 571 OF THE CODE OF PRACTICE OF LOUISIANA DOES NOT CONFER UPON THE STATE THE RIGHT TO APPEAL FROM THE DECREE OF THE UNITED STATES DISTRICT COURT, IN EQUITY.

In the brief filed by the Attorney General it is insisted that Section 571 of the Code of Practice of Louisiana authorizes an appeal by the State from the decree of October 21, 1913, dismissing the suit brought by the Levee Board; but if this section were applicable at all, it would not confer such right.

Section 571 of the Code of Practice of Louisiana provides:

> "The right of appeal is given not only to those who were parties to the cause on which a judgment has been rendered against them, but also to third persons to such suit, when such third persons allege that they have been aggieved by the judgment."

Even though a statute of the State of Louisiana, governing the proceedings in its courts, could govern the procedure on appeal in a Federal Court of Equity, and even though the right of appeal in this cause should be regulated and determined by Section 571 of the Code of Practice of the State of Louisiana, it is the settled jurisprudence of Louisiana that the third person seeking an appeal must not only allege that he had been aggrieved by the judgment, but he must in fact have an interest in the subject-matter of the litigation which is affected by the judgment sought to be appealed from, and he must prove that interest.

In LACROIX VS. MENARD, *et. al.*, 7 Martin (N. S.), 345, decided in 1829, four years after the Code of Practice went into effect, the Supreme Court of Louisiana said:

> "This Court has already decided that when persons not parties to a judgment appeal from it, they must allege and prove in the court of first instance their right to do so; that is, they were aggrieved by it. The correctness of this mode of carrying the 571st Article of the Code into effect has been strongly contested in argument, but after much reflection we do not see what other course can be adopted. The fact of a party being aggrieved by judgment rendered between others is an indispensable condition to his right of appealing. That right must be established somewhere before the correctness of the judgment complained of can be examined into. It cannot be tried in this court, and it must be in that below, or the statute would become a dead letter."

This decision was confirmed and the opinion quoted with approval in FAZENDE vs. FLOOD 24 Ann., 425.

See also:

Arrowsmith vs. Rappelge, *et. al.*, 19 Ann., 327;
State ex rel. Belden vs. Markey, 21 Ann., 743;
Block, Britton & Co. vs. Barton, Miller & Co., 27 Ann., 89;
Guilbeau vs. Detiege, 32 Ann., 911;
Levert vs. Shirley Planting Co. 135 La., 929.

In the case above quoted, STATE EX REL. BELDEN vs. MARKEY, 21 Ann., 743, it was claimed that the affidavit of the third person appellant of his interest and of his being aggrieved by the judgment was binding on the Court, but the Court overruled this claim.

City vs. Dufossat, 46 Ann., 398;
Bland vs. Edwards, 52 Ann., 822;
Board of Liquidation vs. N. O. Waterworks Co., 39 Ann., 202.

The Attorney General seems to think that all he has to do is to aver that the State is aggrieved by the judgment, make affidavit to his petition, and that the State is then entitled to an appeal of right. As shown below, the State has no interest in this litigation.

In GUILBEAU VS. DETIEGE, 32 La. Ann., 909-911, it is said:

> "The rule of law which grants to a third party the right of appeal from a judgment rendered in a suit to which he was not a party, requires him to *allege* and *show* a direct pecuniary interest in the controversy; he must be interested in the defeat of either plaintiff or defendant, or of both; *he must show such an interest as would justify him in law to intervene in the suit before trial and judgment.*"

II.

THE RIGHT TO APPEAL FROM THE DECISION OF THE UNITED STATES DISTRICT COURT, IN EQUITY, IS NOT REGULATED AND CONTROLLED BY THE STATUTES OF LOUISIANA, BUT EXCLUSIVELY BY THE ACTS OF CONGRESS.

Assuming, as he does, that Article 571 of the Code of Practice of Louisiana would confer upon the State the right of appeal, if this litigation were pending in the State Courts of Louisiana, the Attorney General urges that this right of appeal thus conferred by State law will be enforced in the Federal Courts. It is clear, however, that the right, if any, of appeal from a judgment or decree of the District Court of the United States does not depend upon State law, but upon Federal law, and unless found in the Acts of Congress creating the inferior courts of the United States, and regulating the procedure therein, the same does not exist.

It is true that the Courts of the United States have held that where a State statute gives a right, the Federal Courts will give the remedy, but mere methods and rules of procedure provided by State statutes for the courts of the State do not apply to the Federal Courts of Equity, or to appellate procedure in those courts. These rules of State procedure are not the rights covered by the rule.

By the provisions of Section 913 of the Revised Statutes of the United States, which is taken from the Process Act of May 8, 1792, in all suits in equity in the Circuit and District Courts in the United States, forms and modes of proceeding shall be according to the principles, rules and usages which belong to Courts of Equity. In HURST vs. HOLLINGSWORTH, 100 U. S., 100, at page 103, this Court said that the requirement of this statute has always been obligatory upon parties and the Court wherever the question has been raised.

In Section 914 of the Revised Statutes of the United States it is provided that the practice, pleadings, forms and modes of proceeding in actions at law in the District Courts, shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding in like causes in the State Courts. Yet, in all proceedings in error in cases at law in the Federal Courts, the methods and rules of procedure in the State Courts do not apply.

In UNITED STATES vs. TRAIN, 12 Fed., 852 (C. C.), in an opinion by Justice Gray, it was early held that the taking of a case from one Federal Court to another by writ of error or appeal is regulated exclusively by the Acts of Congress, or, when those are silent, by rules derived from common law, from ancient English statutes, or from the practice of the Courts of the United States.

This rule has been recognized in many later cases.

Chateaugay Ore & Iron Company, Petitioner, 128 U. S., 544, 553-555;

St. Clair vs. United States, 154 U. S., 134, 153;

Ghost vs. United States (C. C. A.), 168 Fed., 841, 843;

Logan vs. Goodwin (C. C. A.), 104 Fed., 490;

Menge vs. Warriner (C. C. A.), 120 Fed., 816, 817;

Francisco vs. Chicago & A. R. Co. (C. C. A.), 149 Fed., 354, 358, 359.

In CHATEAUGAY ORE & IRON COMPANY, PETITIONER, 128 U. S., 544, 553-555, in an opinion by Mr. Justice Blatchford, it is said:

> "We are of opinion that the practice and rules of the State Court do not apply to proceedings in the Circuit Court taken for the purpose of reviewing in this court a judgment of the Circuit Court, and that such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within the 'practice, pleadings, and forms and modes of proceeding' in the Circuit Court, which are required by Section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), to conform 'as near as may be' to the 'practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State' within which the Circuit Court is held, 'any rule of court to the contrary notwithstanding.' * * *
>
> "The manner or time of taking proceedings as a foundation for the removal of a cause by a writ of error from one Federal Court to another is a matter to be regulated exclusively by Acts of Congress, or, when they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the Courts of the United States."

In ST. CLAIR VS. UNITED STATES, 154 U. S., 134, 153, it is said:

> "What is necessary to be done in a Circuit Court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or revised in this court, depends upon the Acts of Congress and the rules of practice which this court recognizes as essential in the administration of justice."

MENGE VS. WARRINER, 120 Fed., 816, 817, is a decision of the Circuit Court of Appeals of the Fifth Circuit, delivered by Circuit Judge Shelby, in which he says that the question of the finality of a judgment or decree for the purposes of review by a writ of error or appeal in the Federal Courts is not affected by the procedure in the State Courts, but must be governed by the rules established by Federal legislation and by the decisions of the Federal Courts.

In FRANCISCO VS. CHICAGO & ALTON R. R. CO., 149 Fed., 354, 358-359, Judge Sanborn, speaking for the Court of Appeals of the Eighth Circuit, says of the Conformity Act that:

> "Section 914 is limited by its express terms to the practice and proceedings in the Circuit and District Courts to procure their judgments. It has no application to the practice or proceedings of the Federal Appellate Courts or to any matters relating to bills of exceptions, motions for new trials, or any other means adopted to review the judgments of the Circuit or District Courts. The power and practice of the Federal Appellate Courts are derived exclusively from the Constitution, the Acts of Congress, the common law, the ancient English statutes and the rules and practice of the Courts of the United States, and they may not be extended, diminished, controlled or affected by the statutes of the States or the practice of their courts."

III.

THE STATE OF LOUISIANA IS WITHOUT LEGAL INTEREST IN THE SUBJECT-MATTER OF THIS SUIT, AND HAS NO AUTHORITY IN ITS OWN NAME OR RIGHT TO CARRY ON THE LITIGATION, AND HENCE NO RIGHT TO INTERVENE.

In order to substantiate this it is necessary only to refer to the act creating the Levee Board and the decision of the Supreme Court of Louisiana interpreting the same.

The Tensas-Basin Levee District was created by the Legislature of Louisiana, by Act No. 59 of the session of 1886. Section 3 of that act constitutes and creates the Board of Levee Commissioners of the Tensas-Basin Levee District to be a body politic, with corporate powers, to sue

and be sued in their corporate name, to have a seal and to have the power to do and perform all purposes of the act, etc. The section reads as follows:

> "That the said commissioners shall constitute a 'Board of Levee Commissioners of the Tensas-Basin Levee District,' and they shall be and they are hereby constituted and created into a body politic with corporate powers; they shall have power to sue and shall be sued in the corporate name, and shall have a seal, and shall have the power to do and perform all the purposes of this act; the domicile of this corporation shall be at the Town of Rayville, in the Parish of Richland, and it shall be sued there, and service of citation shall, in all cases, be made upon its president, either in person or at his domicile during his absence wherever he may reside, as in the case of ordinary suits."

Act No. 77 of 1888 is amendatory of the act above referred to, and by virtue of this amendatory act the lands which are the subject of this litigation were conveyed by the State of Louisiana to the Levee Board. This act contains the following provisions:

> "All lands now belonging or that may hereafter belong to the State of Louisiana and embraced within the limits of the Tensas-Basin Levee District, as herein constituted, shall be, and the same are hereby given, granted, bargained, donated, conveyed and delivered unto said Board of Levee Commissioners of the Tensas-Basin Levee District, whether said lands are part of lands originally granted by the Congress of the United States to this State, or whether said lands have been or may hereafter be forfeited to or bought in by or for or sold to the State at tax sales, for non-payment of taxes," etc.

The act further provides:

> "The Auditor and Register of the State Land Office of the State of Louisiana shall, on behalf of and in the name of the State, convey to said Board of Levee Commissioners, by proper instrument or conveyance, the lands hereby granted or intended to be granted and conveyed to said Board, whenever from time to time,

said Auditor and Register of the State Land Office, or either of them, shall be requested to do so by said Board of Levee Commissioners, or by the president thereof, etc. And when said conveyances are so recorded, the title to said lands, with possession thereof, shall from thenceforth vest absolutely in said Board of Levee Commissioners, its successors or grantees. * * * * *Said Board of Levee Commissioners shall have the power and authority to sell, mortgage, pledge or otherwise dispose of said lands, in such manner and at such times and for such prices as to said Board shall seem proper.*"

Prior to the institution of the suit No. 694, brought by the Levee Board against the Land Company, a suit for the recovery of the same lands was brought in the State Courts of Louisiana by the State of Louisiana against the Land Company. That case went on appeal to the Supreme Court of Louisiana, and is reported STATE VS. TENSAS-DELTA LAND COMPANY, LIMITED, 126 La., 59. The decision of the Supreme Court of the State construes the act under which the Levee Board was created. It was there specifically held that the Levee Board could sue to recover the lands, but that the State could not. In the opinion of the Court, by Mr. Justice Provosty, it is said (pp. 71-73):

"Most assuredly and beyond all question, *the Legislature has divested the State absolutely of all beneficial interest in said lands, and transferred same to the said Board of Levee Commissioners.* It is impossible to read the said Act 59 of 1886 hereinabove quoted, and come to any other conclusion.

"The argument that the said Board is nothing more than a mere agency or instrumentality of the State, and that therefore the State may sue in every case where the said Board might sue, contains a manifest *non sequitur*. Every city, town, and parish of the State is a mere agency or instrumentality of the State; but no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the State, any cause of action which any of them might have.

"The legislative control over corporations of the character of this Levee Board is much more complete

than over municipal corporations proper and parishes—it made them, and can at any time abolish them, *so long as the obligations of their contracts are not thereby impaired*—but these corporations have their existence and exercise their functions by and under the Constitution and statutes of the State, and so long as these established laws remain in force *it is they which must regulate the property and other rights of said corporations and their modes of action, and the disposition of their property, and their rights to sue and to be sued.* If one of these corporations has a right of action, *the proper functionary to enforce same is the governing body of the corporation, and not the Attorney General, or the State.* * * *

"We note, in conclusion, that the membership of this Levee Board can be changed at any time by the Governor without his having to assign any reason, and that therefore the Legislature has provided ample remedy for the protection of the people of the district who are the real parties in interest."

In the opinion denying application for rehearing in the same case, the Supreme Court of Louisiana says (p. 74):

"*The Legislature vested the absolute title to the lands in controversy in the Board of Commissioners of the Tensas Levee District, with full power to sell the same on such terms as the Board might deem proper. The Legislature also vested in said Board full power to sue and be sued, and to stand in judgment, in all matters relating to their gestion and trust.* The Board of Commissioners could have brought the present suit to annul the alleged fraudulent sale and recover the lands. The Governor of the State, with his power of appointing and removing members of Levee Boards, can compel them to bring such suits as he may deem proper in the interests of levee districts.

"The General Assembly has the power at any time to authorize the Attorney General to institute actions for the use and benefit of the taxpayers and people of any particular levee district. *But as the General Assembly has vested the power to sue and be sued in the Board of Commissioners of the Tensas Levee District, and has*

vested no such co-ordinate power in the Governor or Attorney General, we are of opinion that the institution of this suit in the name of the State is unauthorized."

The Attorney General claims that the State of Louisiana is affected by the result of this litigation; that indirectly it loses by an adverse decision or by a compromise which he does not approve; and that, therefore, the State has a right to be made a party to the suit and to be heard therein. If that claim is well founded, the State would have a right to interfere with every litigation in which a municipal corporation of the State is a party to the record, and likewise in every litigation the result of which might be said to affect the material prosperity of the State. If such were the case the control of the litigation confided by State statute to the municipal bodies of the State, might be taken from these municipal bodies and placed within the control of the Attorney General at the will of the latter. Such pretension is answered by the language of the Supreme Court of Louisiana in the quotation above made. It is clear, upon reason as well as authority, that the State has no different *status* in litigation than any other body.

In NEW ORLEANS & CARROLLTON RAILROAD CO. VS. CITY OF NEW ORLEANS, 34 La. An., 429, 437, the State undertook to intervene upon a question of the right of a railroad to use the streets in New Orleans. The Court said:

"What the plaintiff is really claiming is the right to operate its railroad through the streets of New Orleans for a period of twenty-five years from 1883; and the question to be determined is whether this valuable right has been conferred upon her by her charter, either expressly or by legal implication. Because, under a particular construction of legislative acts, the State would derive certain pecuniary advantages, furnishes in our judgment, no reason why we should depart from those general rules which are universally applied in the exposition of statutes. The State is the fountain of justice, and *when mere rights of property are asserted in her favor, she subjects herself to the dominion of those laws which she has herself established as the proper standard by which similar rights, when claimed by her citizens, are regulated and determined.* Her dignity and justice re-

> quire that when a question is presented to her courts as to the extent to which she has delegated a part of her sovereign power and conferred upon individuals peculiar privileges not shared by the rest of her children, such question should be determined without consideration of any mere pecuniary advantage to the State. We at least shall determine this question precisely as if the reversion of property claimed under the statute had been stipulated in favor of any individual instead of the State."

The same principle is recognized and applied in a recent case in the Supreme Court of the United States, to which reference will later be made upon another point. We refer to *Ex-parte* LEAF TOBACCO BOARD OF TRADE OF THE CITY OF NEW YORK, 222 U. S., 578, 581. In a *per curiam* opinion denying *mandamus* to permit petitioner to intervene in a cause in the court below, it is said:

> "The merely general nature and character of the interest which the movers allege they have in the papers here filed is not in any event of such a character as to authorize them in this proceeding to assail the action of the court below. This is more obvious in this case since the act of the court which is assailed has been accepted by those who are parties to the record."

The authorities, indeed, go much beyond anything for which it is necessary for us to contend in the instant cause. The compromise in the suit at bar was made in the utmost good faith, and the contrary is not suggested. But well considered cases maintain that even if it were fraudulently made, no action would lie in the name of the State to set it aside.

PEOPLE OF THE STATE OF NEW YORK VS. FIELDS, 58 N. Y., 491, arose in the days of the Tweed regime. Defendant Fields, by fraud and collusion with the Comptroller of the City New York, obtained from the City treasury a sum of money in excess of $459,000. It was made to appear that the City of New York, and all its officers who might or could exercise any power or authority in the premises, had, with full notice and knowledge of the facts, acquiesced in the misapplication of the moneys and colluded with the defendant in protecting him from responsibility by any judicial means or remedies. Suit for the redress of the wrong was, therefore, brought in

the name of the People of the State, and recovery was had in the lower court, notwithstanding the protest of the defendant that neither the State nor the Attorney General was entitled to sue. Judge Folger, in the opinion of the court, said (p. 508):

"We think that the question is thus fairly raised in the case, whether if a municipality has a right of action for its money wrongfully received from its treasury, and refuses to prosecute for a recovery, the State may, in its character of *parens patriae*, bring action nominally for itself, but really in behalf of the individuals or body of citizens, who are presently or ultimately, to be affected by the wrongful payment and misapplication. * * *

(p. 509).

"The money of a municipal corporation has been illegally paid by its officers, and illegally received by the appellant. The municipality and its officers refuse to sue for a recovery thereof. This presents the case of a fund, held in trust for the public purposes of the members of a municipal corporate body, which has been unlawfully despoiled, and the official trustees of which, with whom is the primary right of action, refuse to act for its protection and reinstatement, and for the redress of the injury to the body of the taxpayers, present or future, who are, in a sense, the *cestuis que trust.* * * *

(P. 512).

"Such an omission of the corporation to assert its legal rights, cannot work a transfer of the fund and right of action to the plaintiffs. It may be that it was a breach of trust, and of duty, on the part of the managing body and official representatives of the municipality, but cannot operate as a forfeiture of the rights of the constituents, the *cestuis que trust*, or confer upon the plaintiffs a legal right to the money, or authorize the people, by their attorney-general, to take the place in court, in pursuing the wrong-doer and asserting a right to the money, which the law gives to the legally entitled custodian and trustee. The corporate authorities of the city of New York can no more donate, or transfer, without consideration or authority of law, the property of the city to the State, than they can to the

defendant or any stranger. Every act of that kind would be *ultra vires* and would confer no legal right upon the transferee. * * *

(Pp. 513-514).

"Most certainly the fraud and collusion of the city officials alleged, could not and did not deprive the city of New York of its property rights, or confer title to the money in dispute on the State. Such an idea would be preposterous, and is not put forth by any one. The loss to the city by the misfeasance or malfeasance of its official representatives and agents, could only be such as naturally and necessarily resulted from the omissions or actions, and not such as could form a forfeiture of legal rights; and because loss might ensue to the city, as a consequence of the neglect or wrong-doing of its servants or agents, it would by no means follow as a legal or logical sequence, that the title to the money, and what might be saved, became vested in the State, or any other body, whose representatives would be more vigilant in protecting, or pursuing and retaining it."

Upon the proposition that, if the Attorney General could intervene and appeal, it must be in the name of Levee Board. we also cite LEVERT VS. SHIRLEY PLANTING CO., 135 La., 929. Appellants were stockholders, and on pp. 932-933 it is said of their appeal:

"If the appellants had occasion to apprehend injury to the property of the corporation, their remedy was to call upon the officers of the corporation to act for the corporation in the premises; and if these officers would do nothing, then to take action themselves, *but in the name of the corporation, not in their own.* Had the appellants in this case alleged and shown that they had called upon the Board of Directors of the defendant corporation to take an appeal, and that these directors had refused, or, at any rate, failed to do so, and *had the appeal been taken in the name of the corporation,* a different case might have been presented."

IN MIOTON VS. DEL CORRAL, 132 La., 730, it is held that a single shareholder, or any number of shareholders, or the

whole number, have not the right to sue in their own names or in the corporate name to recover damages to corporate property. It is said (p. 736):

> "And we have held that the members of a corporation may not sue as individuals. SALLER vs. MOUTON, 3 La. Ann., 541. In extreme cases a stockholder may sue, as when the corporate officers, after having been called upon to sue, failed in their duty, *which allegations must be alleged and proved.*"

The Attorney General refers to LITTLE vs. WILLIAMS, 231 U. S., 335; CHAPMAN vs. LEVEE DISTRICT, 232 Id., 186, 198; and ROGERS LOCOMOTIVE MACH. WORKS vs. AMERICAN EMIGRANT CO., 164 Id., 559, (Record 4); but these cases are not at all in point in this discussion.

LITTLE vs. WILLIAMS and CHAPMAN vs. LEVEE DISTRICT arose in Arkansas under the Swamp Land Act passed by Congress in 1850, and compromise was made in 1895 between the State of Arkansas and the United States, under which the State relinquished all rights in the land in question. This compromise was approved by the State Legislature in 1897, and by Congress in 1898. These two cases go merely to the extent of holding this compromise to be binding on the Levee District, a subordinate agency of the State. Clearly it was binding, for the compromise was the result of legislative enactment. It was within the legislative power to create or abolish the levee district, and take from it the title to the lands which it held. If the Legislature could abolish the levee district, clearly it could bind the district by its compromise made by legislative enactment.

But in the instant cause the Legislature of Louisiana did not choose so to act. It invested the Levee Board with full power of control and disposition of the lands, and it results that so long as that power remains unrevoked it is within the authority of the Levee Board to convey good title to the lands or compromise the litigation respecting the same.

The like observations apply to ROGERS LOCOMOTIVE MACH. WORKS vs. AMERICAN EMIGRANT CO., 164 U. S., 559, 576, 577. It is said on page 576:

> "The State made it (the county), and could, in its discretion, unmake it, and administer such property and revenue through other instrumentalities."

We do not dispute this doctrine. In the suit at bar the State, through its legislative body, made the Levee Board and devolved upon it the duty to administer the property; but the Legislature of Louisiana has never unmade the Levee Board, nor sought to administer the lands through a different instrumentality. Certainly it does not lie within the scope of the duties of the Attorney General to unmake that body which the Legislature has created, nor destroy or take from its powers. It follows, as a logical consequence, that the acts of the Levee Board in the discharge of the duties thus expressly delegated to it by the State Legislature are valid and binding.

The Attorney General has referred to Article 58 of the Constitution of Louisiana of 1898, and has claimed that this Article shows that the State has an interest in the lands sold by the Levee Board. This Article is also contained in the Constitution of 1913, as Article 58 and was also in the Constitution of 1879 as Article 56. It is as follows:

> "The funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private; nor shall the State, or any political corporation, purchase or subscribe to the capital or stock of any corporation or association whatever, or for any private enterprise. Nor shall the State, nor any political corporation thereof, assume the liabilities of any political, municipal, parochial, private or other corporation or association whatsoever; nor shall the State undertake to carry on the business of any such corporation or association, or become a part owner therein; provided, the State, through the General Assembly, shall have power to grant the right of way through its public lands to any railroad or canal; and, provided, the Police Juries and municipal corporations may, in providing for destitute persons, utilize any charitable institutions within their corporation limits for the care, maintenance and asylum of such persons, and all appropriations made to such institutions for the purpose aforesaid, shall be accounted for by them in the manner required of officials entrusted with public funds."

This Article of the Constitution has never been construed by the Courts of Louisiana to in any manner limit or prevent the State from creating Levee Boards or Drainage Boards or other subdivisions of Government, for the purpose of aiding and assisting the State in carrying out its proper functions, and, by Legislative enactment, delegating to these political subdivisions certain powers and duties with respect to the subject matters making necessary their creation, and, in aid of the purposes under which they are brought into existence, the granting of State property to such political subdivisions in full fee title, to be sold and disposed of by such subdivisions in aid of the objects and purposes for which they are created.

In the case of BENEDICT vs. CITY OF NEW ORLEANS, 115 La., 645, the Court, on p. 656, says:

> "The Article (58) was never intended to hamper the Government of a State in the performance of public duties, such as the providing of accommodations for public functionaries. In conducting the ordinary business of the State, and availing itself to that end of the means in its judgment most suitable, the Legislature of Louisiana is as free and untrammelled as that of any other State."

This language was used with reference to lending the State's aid in the construction of a public Court House in the City of New Orleans, and it could equally be used with reference to carrying out the State's duties, under the Constitution, for the construction of levees.

Article 238 of the Constitution provides that a levee system shall be maintained in the State, etc., and Article 239 provides for the creation of levee districts with authority and such powers as are granted in the article and given by the Acts of the Legislature carrying the same into effect, to take charge of and perform the duties and functions of the government of the State to the extent of building and looking after the levee systems.

We can find no case where the right of the State to donate or transfer these lands was ever questioned.

In the case of FISCHER vs. LEVEE BOARD, 39 La. An., 453, cited by the Attorney General, which case involved the same Levee District as interested in this case, the court meant to do nothing more than is implied by the language of the decision, as quoted by the Attorney General, that:

> "This Levee Board was created by the State as one of its functionaries, charged with the duty of providing for the general welfare of the people, by protecting them from inundation, could, by any reasoning, be considered as an association or corporation distinct from, and independent of, the State *within the intendment of the prohibition contained in Article 56 of the Constitution*," etc.

In other words, within the intendment of that Article of the Constitution the Levee Board was a functionary of the State, created by the State to carry out the purposes and obligations of the State pertaining to the general welfare of its citizens, and therefore the giving of property or placing the funds and credit of the State at the disposal of such a functionary of the State, was not a violation of Article 56 of the Constitution, (1879, new Art. 58 of 1898 and 1913). This meant nothing more than that the Article was intended to refer to separate, distinct, independent public or private corporations, charged with no function of government in behalf of the State, and not acting for the State in relieving it of some of the burdens of its obligations to its citizens.

This would in no way conflict with the theory that we have advanced in this case, and that is, that, inasmuch as the State had granted to this political subsidiary or subdivision of the State, the Levee Board, the duty of carrying out a part of its obligations to its citizens, and had placed in its hands by fee simple title the property of the State to be used for that purpose, it divested itself of the power and control over the property, excepting only by and through its control of the Levee Board itself through the exercise by the Governor of his Constitutional power of removal of the membership of the Board at his pleasure, or the withdrawal by the Legislature of its Charter or grant of authority in the creation of the Board itself, the latter of course being subject to whatever contracts that might have legally been entered into by the Board during its life, or such vested interests as third persons may have obtained from it.

The other case referred to by the Attorney General, that of ORR VS. NEW ORLEANS, 50 La. An., p. 880, deals with an entirely different character of question and corporation. In that case, a municipal corporation of the State, the City of New Orleans, was undertaking to donate a large part of

its revenue to charitable and other eleemosynary institutions, and in doing so it had reduced its funds to such an extent that it was no longer in condition to properly carry on its public schools. Under these conditions, the plaintiff, a citizen and taxpayer, representing that he had children within the school ages, and that they were entitled to the benefit of public education, as provided under the Constitution of the State, and that they were being deprived of such education because of the action of the City in depriving itself of the necessary funds to maintain its public schools, by donations to the institution above referred to, sought to enjoin any further disposition of the funds of the City to such purposes and to annul the ordinances of the City under which the donations were made, among other grounds that the ordinances were in violation of Article 56 of the Constitution of 1879, being the same article as now contained in the Constitutions of 1898 and 1913 as Article 58, and the Court held that the Ordinance was a violation of Article 56 in that it was giving the funds and property of the municipality to private corporations, and the crux of the opinion was to the effect that municipal corporations, deriving their existence from the State, were included in the provisions of the Article of the Constitution, which broadly stated, referred to the funds, credit, property or things of value of the State or any political corporation thereof.

We can see no analogy between these cases cited by the Attorney General and the instant cause. If the State, because of any recognized public policy thereof, did not intend to be bound by the acts of the Levee Board, the grant of power and authority to the Levee Board should have been limited and restricted within the bounds of its intendment, but having granted to it full, complete and absolute dominion over the property transferred, it could no longer directly or indirectly control the disposition of the property so long as the proceeds thereof were directed to the purpose for which the property was transferred. It is not disputed in this case but that the proceeds both of the sale in the first instance and of the compromise in the second instance, were used in a proper manner and for the proper purposes intended by the State that it should be when the grant was made of the lands to the Levee Board.

IV.

THE STATE OF LOUISIANA IS NOT A PARTY TO THE RECORD IN THE COURT BELOW, NOR TO THE DECREE OF OCTOBER 21, 1913, DISMISSING THE CAUSE, AND HENCE IS NOT ENTITLED TO APPEAL FROM THAT DECREE.

It is a familiar rule that one who is not a party to a record and judgment is not entitled to appeal therefrom.

Bayard vs. Lombard, 9 How., 530;
Ex-parte Cutting, 94 U. S., 14;
Ex-parte Cockroft, 104 Id., 578;
Guion vs. Liverpool, London & Globe Ins. Co., 109 Id., 173;
Ex-parte Leaf Tobacco Board of Trade, 222 Id., 578, 581;
Cook vs. Lasher, 73 Fed., 701, 704, (C. C. A.);
Mayor, etc., of Vicksburg vs. Vicksburg Waterworks Co., 231 U. S., 739.

In the early case of BAYARD VS. LOMBARD, *supra*, (p. 551), it was said by the Supreme Court of the United States:

> "It is a well-settled maxim of the law, that 'no person can bring a writ of error to reverse a judgment who is not a party or privy to the record.' "

The most recent expression of opinion upon this subject in the Supreme Court of the United States reaffirms this rule. We refer to *Ex-parte* LEAF TOBACCO BOARD OF TRADE, *supra*, where it is said:

> "One who is not a party to a record and judgment is not entitled to appeal therefrom."

But even a party to a suit cannot appeal from a decree therein rendered, if he is not thereby affected. As said by Chief Justice Waite in FARMERS' LOAN & TRUST CO. VS. WATERMAN, 106 U. S., 265, 269:

> "Only parties to a decree can appeal. If a party to the suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree."

It results, therefore, that the State of Louisiana, being neither a party to the suit nor a party to the decree, cannot

appeal from the decree dismissing the bill unless the mere fact that the application made April 6, 1914, by the Attorney General, for leave to intervene in behalf of the State, gives such right of appeal. It is plain that it does not. Indeed from what has already been said, it is clear that the State has no right to intervene or carry on the litigation.

The Attorney General does not contend that the State of Louisiana was a party to the litigation in the United States District Court. As we have already seen, not only was it not a party plaintiff, but the Supreme Court of Louisiana held that it was not entitled to become a party plaintiff and conduct the litigation. The Attorney General contends, however, that, while the State of Louisiana was not an actual party to the suit, it was a *quasi* party. This theory he works out by asserting that:

> "The Levee Board is really a nominal party, since the lands are the lands of the State, confided to the care of an instrumentality which is subject to the paramount authority of the State, and the State is, in a legal sense, a *quasi* party and entitled to appeal." (Petitioner's brief, 37).

The corporate existence of the Board of Levee Commissioners of the Tensas-Basin Levee District is not denied. That it held the title to the lands conveyed to the Tensas-Delta Land Company, Limited, with power to sell the same, is not disputed. But the argument seems to proceed upon the theory that the State has such beneficial interest in the lands and such right of control over the corporate body which held them as to give it the right to appeal in its own name as a *quasi* party to the suit.

If the State could not be a party plaintiff in a suit brought directly by it to set aside the sale by the Levee Board of the lands in question, as held by the Supreme Court of Louisiana, it follows that the State cannot be a *quasi* party to a suit to set aside that sale. The State cannot indirectly do that which it lacks the power to do directly.

This view is upheld by the Supreme Court of Louisiana in a recent case. We refer to LEVERT VS. SHIRLEY PLANTING Co., 135 La., 929. It was there held that the stockholders of a corporation have no pecuniary interest in its property which entitles them to appeal from a writ of seizure and sale

in an action by the president of the corporation based on a mortgage executed by the corporation and subsequently acquired by him. In the opinion of Justice Provosty it is said (pp. 931-932):

> "It is elementary in the law of corporations generally that the property which a corporation owns is its own, to be managed by it as it deems best; and that the suits which it brings, or that are brought against it, are, in like manner, its own, to be prosecuted, or defended, as it deems best; and that the individuals who compose the corporation are, legally speaking, strangers to it, and cannot interfere with the management of its affairs or with the suits that are brought by or against it, no more than they can interfere with the affairs of their next-door neighbor, or their neighbor across the street. * * *
>
> "This court has expressly held that a shareholder has not such an interest in the property of the corporation as will afford him a standing for bringing suit in his own name for injury to the property of the corporation. MIOTON VS. DEL CORRAL, 132 La., 730; 61 South, 771. *And, needless to add, if he has no interest for bringing suit, he has none for appealing.*"

Inasmuch as it was held by the Supreme Court of Louisiana, in the suit in the 126th Louisiana, that the State had "*no interest for bringing suit,*" it follows that the United States District Court and the Circuit Court of Appeals were clearly right in holding that it had "*none for appealing.*"

Counsel assert (brief for petitioner, p. 42) that the case of WILLIAMS VS. MORGAN, 111 U. S., 684, upholds the right of the Levee Board, as a *quasi* party to the cause, to take an appeal; but it is clear that the case is not authority therefor. That case involved an allowance made to trustees under a railroad mortgage for their services, and it was held that bondholders were entitled to intervene and appeal from an order making an allowance to the trustees which was claimed to be excessive. The ground of the holding is thus stated by the court (pp. 696-697):

> "As bondholders, and as interested under the second mortgage, if not under the purchasing agreement, we do not well see how the court, under the circumstances, could have refused their application. The trustees

themselves, who were the nominal complainants, were the parties interested to obtain large allowances for themselves, and could not be relied on to have them reduced."

In the instant cause these considerations do not apply. The members of the Levee Board do not assert any personal claims or interests antagonistic to their trust. Their good faith in the discharge of their duties is in no wise brought in question.

V.

No Appeal Lies From the Order Denying Leave to Intervene, and, Inasmuch as the Leave Was Denied and the State of Louisiana Never Became Party to the Cause, It Follows That No Appeal Lies From the Order Dismissing the Suit.

This case is to be disposed of upon well-settled principles. Not only was the State of Louisiana not a party to the suit, but it did not apply to become such until nearly six months after the cause was dismissed out of the District Court, pursuant to the act of compromise. The application by the Attorney General, in the name of the State, for leave to intervene, made on April 6, 1914, was addressed to the sound discretion of the District Court, and was denied by that court. No appeal lies from the order denying leave to intervene; and, inasmuch as the leave to intervene was denied, and the State of Louisiana never in fact became a party to the cause, it results, upon principles to which we have already adverted, that no appeal lies, at its instance, from the order made on October 21, 1913, dismissing the suit out of the District Court. The ruling of Judge Boarman upon this head is pointedly sustained by decisions of this Court and other Federal Courts.

Connor vs. Peugh's Lessee, 18 How., 394, 395;
Ex-parte Cutting, 94 U. S., 14, 19-22;
Guion vs. Liverpool, London & Globe Insurance Co., 109 Id., 173;
Credits Commutation Co. vs. United States, 177 Id., 311;

Re Metropolitan Railway Receivership, 208 U. S., 90, 106;
Ex-parte Leaf Tobacco Board of Trade, 222 U. S., 578;
Blaffer vs. New Orleans Water Supply Co., (C. C. A., 5th Cir.), 160 Fed., 389;
Fink vs. Bay Shore Terminal Co. (C. C. A., 4th Cir.), 144 Id., 837, 838;
Land Title & Trust Co. vs. Asphalt Co. of America (C. C. A., 3rd Cir.), 127 Fed., 1, 21, 22;
Credits Commutation Co. vs. United States (C. C. A., 8th Cir.), 91 Fed., 570, 572-574;
In re Columbia Real Estate Co. (C. C. A., 7th Cir.), 112 Id., 643;
Thomasson vs. Guaranty Trust Co. (C. C. A., 7th Cir.), 159 Fed., 126;
Jones & Laughlin, Ltd. vs. Sands (C. C. A., 2nd Cir.), 79 Id., 913;
Lewis vs. Baltimore & L. R. Co. (C. C. A., 4th Cir.), 62 Id., 218;
Hamlin vs. Toledo, etc., Co. (C. C. A., 6th Cir.), 78 Id., 664, 665;
United States Trust Co. vs. Chicago Terminal Transfer R. Co. (C. C. A., 7th Cir.), 188 Fed., 292;
Lisman vs. Knickerbocker Trust Co. (C. C. A., 6th Cir.), 211 Fed., 413;
Farmers & Merchants Bank vs. Arizona Mutual Savings & Loan Assn. (C. C. A., 9th Cir.), 220 Fed., 1.

The Act of Congress of March 3, 1891, Chapter 517 (U. S. Comp. Stat. 1901, p. 549), provides:

> "The Circuit Courts of Appeal established by this act shall exercise appellate jurisdiction to review, by appeal or by writ of error, *final decision* in the District Court and the existing Circuit Courts, in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

It is clear that the denial by Judge Boarman of the petition of the State of Louisiana, through its Attorney General, for leave to intervene, is not a final decision within the meaning of the Circuit Court of Appeals Act; and the authorities

above cited control the disposition of the instant cause and render necessary the denial of the writ of *mandamus* now sought.

CONNOR VS. PEUGH'S LESSEE, 18 How., 394, 395, was an action of ejectment brought in the Circuit Court. The tenant did not appear and have herself made defendant in place of the casual ejector, according to the exigency of the notice served; and at the October term, 1854, a judgment was entered against the casual ejector in the usual form. On June 5, 1855, the tenant in possession came into court for the first time and moved to set aside the judgment and execution issued thereon and to be allowed to defend the suit for reasons set forth in her affidavit. The Court refused to grant the motion, whereupon the tenant in possession prayed an appeal. Mr. Justice Grier said:

> "The tenant in possession having neglected to appear and have herself made defendant and confess lease, entry and ouster, the judgment was properly entered against the casual ejector. No one but a party to a suit can bring a writ of error. The tenant having neglected to have herself made such cannot have a writ of error to the judgment against the casual ejector.
>
> "*The motion afterwards made* to have the judgment set aside and *for leave to intervene was an application to the sound discretion of the Court. To the action of the Court on such a motion no appeal lies*, nor is it the subject of a bill of exceptions or writ of error."

Ex-parte CUTTING, 94 U. S., 14, 19-22, like the instant cause, was a petition for a writ of *mandamus* to the Circuit Court of the United States to compel that Court to allow an appeal from its decree. The opinion is by Chief Justice Waite, who says:

> "To entitle the petitioners to the writ asked for in this case, they must show that they have a clear right to an appeal which has been refused by the Circuit Court. The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has *a clear right to demand such a performance and who has no other adequate remedy.* It is never granted in anticipation of an omission of duty, but only after actual default.

"This application is for a writ commanding the Judges of the Circuit Court, or one of them, to allow the petitioners an appeal from the decrees in the cause, and a *supersedeas*. This is the only specific relief asked; and, in support of the application, it is insisted that Marie, Otis, Cutting, Jr., Cutting and Fearing, were admitted as parties to the suit March 25th, when they filed their petition therefor, and that consequently they were in a position to demand an appeal as parties. * * *

"The persons presenting the petition of March 25th never did in fact become parties, and it is apparent from the record that their present claim in that regard is an after-thought. They filed their petition to be made defendants in the suit, but it was never granted. * *

"From this it is apparent that *if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the Court to that effect, but his petition must be granted;* and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party. That, as we have seen, is not the case here. * * *

"Upon this state of facts, it is impossible to say that the petitioners, or any of them, have established their right to appeal as actual parties to the suit before the decree.

"*No appeal lies from the order of October 3rd, refusing them leave to intervene and become parties; for that was only a motion in the cause, and not an independent suit in equity appealable here.*

"Neither can these petitioners appeal as stockholders. *Only parties, or those who represent them, can appeal.* The stockholders do not represent the corporation, but for some purposes the corporation represents them. They are sometimes admitted as parties to a suit, for the purpose of protecting their own interests in the corporation against unfounded and illegal claims against it, but this 'remedy is an extreme one, and should be admitted by the Court with hesitation and caution.' (BRONSON VS. LACROSSE RAILROAD CO., 2 Wall., 302). It is always addressed to the sound judicial discretion of the Court. That we cannot control by *mandamus*."

GUION VS. LIVERPOOL, LONDON & GLOBE INSURANCE CO., 109 U. S., 173. Guion, claiming to have an interest in certain railway bonds which were the subject of foreclosure, filed his petition in the foreclosure suit, asking to be admitted as a party to the suit for his own protection. This petition was denied and Guion was allowed an appeal on giving bond. The appeal was dismissed for want of jurisdiction. Chief Justice Waite, in the opinion of the Court, said:

> "The petition of Guion was for leave to appeal from a decree in a suit to which he was not a party. We decided in *Ex-parte* CUTTING, 94 U. S., 14, that such an appeal could not be taken. He had applied for leave to become a party, but this leave was not given. So he is not a party to the decree from which he appealed."

The most recent expression of opinion by the Supreme Court of the United States upon this head is found in *Ex-parte* LEAF TOBACCO BOARD OF TRADE, 222 U. S., 578. This was an application for leave to file a petition for *mandamus*, prohibition and writ of *certiorari*, in order to review the decree of the lower Court carrying into effect the decree of the Supreme Court of the United States in the suit UNITED STATES OF AMERICA VS. AMERICAN TOBACCO COMPANY. The leave to file the petition was denied and the following reasons were assigned in the *per curiam* opinion (p. 581):

> "1. One who is not a party to a record and judgment is not entitled to appeal therefrom. (BAYARD VS. LOMBARD, 9 How., 530; INDIANA VS. LIVERPOOL, LONDON & GLOBE INS. CO., 109 U. S., 168; *Ex-parte* COCKROFT, 104 U. S., 578).
>
> "2. The action of the Court below in refusing to permit the movers to become parties to the record is not susceptible of being reviewed by this Court on appeal, or indirectly under the circumstances here disclosed, by the writ of *mandamus*. (*In re* CUTTING, 94 U. S., 15, and see CREDITS COMMUTATION CO. VS. UNITED STATES, 177 U. S., 311).
>
> "3. The merely general nature and character of the interest which the movers allege they have in the papers here filed is not in any event of such a character as to

authorize them in this proceeding to assail the action of the Court below. This is more obvious in this case since the act of the Court which is assailed has been accepted by those who are parties to the record. (UNITED STATES vs. UNION PACIFIC R. R. Co., 105 U. S., 262; ELWELL vs. FOSDICK, 134 U. S., 500)."

The declared views of the Circuit Court of Appeals of the Fifth Circuit on this subject are in precise harmony with the decisions of the Supreme Court of the United States above cited. BLAFFER vs. NEW ORLEANS WATER SUPPLY Co., 160 Fed., 389, is a decision of that Court. It holds that an order refusing to allow one to intervene is not an appealable order, being an exercise of discretion and not final in character; that he is left free to assert his rights in any other tribunal of competent jurisdiction, the order not being, in any sense, a determination of the merits of his claim. On page 391 it is said:

"The second ground of the motion to dismiss the appeal is based upon the fact that the intervenor failed to obtain an order permitting him to intervene and thereby making himself a party to the suit, from which it follows that he is not in an attitude to appeal from the decree entered in the cause or from the refusal of the Court to permit him to intervene. *The action of the Court in declining to make an order allowing appellant to intervene was an exercise of purely discretionary power and was not final* in its character. Appellant failing to obtain the right to intervene was left free to assert such other rights as he might possess in any other tribunal of competent jurisdiction. The order of the Court was equivalent to a denial of the application of the appellant for leave to intervene, and should not be regarded in any sense as a determination of the merits of his claim. (CREDITS COMMUTATION Co. vs. UNITED STATES, 177 U. S., 311). * * * In this case it affirmatively appears from the statement of the trial Judge that he declined to make any order upon intervenor's petition. That an appeal does not lie from the order of the Court below denying the motion in a pending suit to permit a person to intervene and become a party thereto is supported by the following authorities (citing many cases.)"

The rule of law for which we contend is recognized by the case cited by counsel in their petition for *mandamus* and *certiorari* (Record, 13). They there assume to quote from the decision of three Judges of the Eighth Circuit, in UNITED STATES VS. NORTHERN SECURITIES CO., 128 Fed., 808, as follows:

> "Nor will intervention lie after decree, unless to protect an interest which cannot otherwise be protected."

But counsel do not correctly quote either the paragraph or sentence as written by Circuit Judge Thayer in that case. What he said was this (p. 810):

> "*Applications for leave to intervene in a case after the entry of a final decree are very unusual.* They are never granted as a matter of course, and, *owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected,* or to avoid some complication that is liable to arise."

The rule of law thus declared is fatal to the intervention and appeal now sought. It is not necessary that this intervention be granted in order to preserve the rights of the State of Louisiana in the lands in question, if any such rights there be. The District Judge so returns. In paragraph 16 of his return he says:

> "I deny that petitioner's interests in the subject-matter of the aforesaid suit cannot be protected except by and through an appeal from the final decree ratifying said compromise and dismissing said suit. In my view the petitioner has no interest in the subject-matter of said suit, but if it had any, an independent suit would, without doubt, lie for the protection thereof."

This is not like the case of a fund in court of which division is about to be made, where all rights of the party applying for leave to intervene will be lost unless intervention be granted. In the suit at bar the lands are still existent; they stand of record in the name of the Land Company; and if the State of Louisiana has any rights therein, an independent suit lies in the name of the State to enforce

those rights. The distinction upon which we rely is made clear in CREDITS COMMUTATION CO. VS. UNITED STATES, 177 U. S., 311. That case brought under review the action of the Circuit Court of Appeals of the Eighth Circuit in denying the petitions for leave to intervene in three certain litigations affecting the Union Pacific Railway Company. One of the suits was for the appointment of receivers, the enforcement of certain liens and the administration of the properties. Another suit was a bill of complaint of the trustees of the first mortgage of the railway to foreclose that mortgage. The third suit was a bill by the Uuited States to foreclose the subsidy lien of the United States upon the property of the Union Pacific Railway. The Credits Commutation Company and the Combination Bridge Company asked leave to intervene, and an order was made in the Circuit Court denying the prayers for leave to intervene. Appeal was taken to the Circuit Court of Appeals, and in that court motions were made by the appellees and granted to dismiss the appeal, and thereupon an appeal to the Supreme Court of the United States was allowed. In that court a motion was made to dismiss or affirm. In the opinion of Mr. Justice Shiras it is said (pp. 314-317):

> "To show that the Circuit Court, in denying the petition for leave to intervene, was not exercising the usual discretion of a chancellor in passing upon a petition of an outside party for leave to intervene, but adjudicated the petitioners' rights asserted in the petitions, as if upon demurrer thereto, we are pointed to the language used: 'Ordered, that the prayers of the petitioners for leave to intervene herein be, and the same are hereby denied, not as a matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene.'
>
> "It is urged that the Circuit Court declined to treat the subject as of one of discretion, and elected to determine the legal rights of the petitioners, so as to preclude them from resorting thereafter to some other tribunal, and that, therefore, its judgment was a final one and properly reviewable on appeal.
>
> "We cannot accept this view of the meaning and effect of the order in question. *What was sought in the pe-*

titions was leave to intervene in a pending and undetermined cause, and that right alone was determined. The very terms used by the Court, that the facts stated were 'not sufficient to show that the petitioners, or either of them, have a legal right to intervene,' shows that what was considered was the right to intervene. That right refused, the petitioners were left free to assert such other rights as they might possess as in any other tribunal. * * *

"The question was well considered by the Circuit Court of Appeals, and we quote and adopt its statement, as follows:

" 'When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial Court. * * * It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. The cases at bar, however, are not of that character. The petitioners were under no obligation to intervene in the litigation against the Union Pacific Railway Company to preserve their alleged right to form a junction with the road of that company when they should have completed their own road to a suitable junction point. The question which they sought to litigate in the pending litigation,

could, we think, with more propriety and with less difficulty, have been litigated by an independent bill after they had completed, or were about completing, their line to a suitable junction point. Prior to that time the questions which they sought to raise by means of the intervening petitions were speculative questions, which the lower Court, as we think, very properly, refused to consider or determine.' * * *

"*As its action* (the action of the Circuit Court) *in denying the petitions to intervene, was an exercise of purely discretionary power, and not final in its character* as respects such alleged right to connect, *we think the Circuit Court of Appeals was right in holding that the appeals could not be entertained by that Court*, and its decree, dismissing the same, is accordingly affirmed."

The above case, as reported in the Circuit Court of Appeals of the Eighth Circuit, is CREDITS COMMUTATION Co. vs. UNITED STATES, 91 Fed., 570, 572-574.

In addition to the language quoted by the Supreme Court of the United States, it is said by the Circuit Court of Appeals:

"The motion to dismiss the several appeals is grounded on the proposition that the order from which the several appeals were taken was not a final judgment or decree from which an appeal will lie to this Court, and upon the further proposition that the action of the lower Court in refusing leave to intervene is not reviewable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention. Both of these positions are, in our opinion, well taken. *The order denying leave to intervene was not 'final,' within any of the definitions usually given of a final order or decree, inasmuch as it did not dispose of the petitioner's alleged right* to form a junction with the main line of the Union Pacific Railroad, which was the substantial right asserted, *but left them at full liberty to litigate that question by an original bill, or by any other method of procedure which they saw fit to adopt.* The trial Court could not, and did not, finally adjudicate any of the questions which were presented by the intervening complaint, for the reason that it refused to give the petitioners a standing in court to be heard with respect

to such question, and also refused to permit the intervening complaint to be filed and become a part of the record. None of the issues, therefore, which were tendered by the petitioner's in their intervening complaint, ever passed under judicial review in such a manner as to estop the petitioners from tendering like issues on any future occasion, because the trial Court refused to allow such issues to be incorporated into the pending suits in such a form that they could be tried and determined. * * *

"It was suggested in argument that, as the lower Court saw fit to insert a clause in its order that it had not refused leave to intervene 'as a matter of discretion,' but because the petitioners had no legal right to intervene, therefore the motion to dismiss is not tenable, so far as it is based on the discretionary character of the order. The answer to this suggestion is that the trial Court, by inserting such a clause in its order explanatory thereof, could not give an effect to the order which was in any respect different from the effect which it had by virtue of the nature of the proceeding in which the order was made. The intervening petition merely invoked the discretionary power of the Court, and it could exercise no other power in the premises, whatever the purpose of the Court or its own declaration on the subject may have been. The fact is that the lower Court simply exercised its discretionary authority in denying leave to intervene, and it did not succeed in rendering a judgment upon the merits of the petitioners' claim which will conclude them in any subsequent suit, although it may have intended to do so. As it is now well settled, since the decision in McLish vs. Roff, 141 U. S., 661, that an appeal will only lie to this Court from orders or decrees which are final in their character, and which involve something more than the exercise of purely discretionary powers—except in some cases for which special provision is made by the seventh section of the act under which this Court was created (26 Stat., 826, c. 517)—it follows that the appeals cannot be entertained, and that the motions to dismiss the same must be sustained. It is so ordered."

If it be said that an independent suit will not lie, we say in reply that this is only because the State of Louisiana has no legal interest in the subject-matter in controversy. If the State has no legal interest in the subject-matter of this litigation, that is an objection which applies with equal force to its petition for leave to intervene. This is pointedly held in *Ex-parte* LEAF TOBACCO BOARD OF TRADE, 222 U. S., 578, 581, to which we have called attention in Division III. of this brief.

It is urged by the Attorney General (brief, 44-45) that, inasmuch as we claim that the State is not entitled to sue, we are inconsistent in urging that the State has no right to intervene, but that the remedy, if any, is by independent suit. In this there is no inconsistency. We merely rely upon two defenses to the application for leave to intervene and appeal now made. We say *first*, that there is no right to intervene and appeal, the sole remedy, if any, being by way of independent suit; and *second*, that there is no remedy whatsoever, in the name or behalf of the State of Louisiana, either by independent suit or by intervention and appeal. for the reason that the State is without legal interest in the subject-matter, and it was so specifically held by the Supreme Court of Louisiana in the suit brought by the State against TENSAS-DELTA LAND CO., LTD., reported in 126 La., 59.

It is said by petitioner that the proper practice is for the District Court to grant an appeal in every case, leaving the question of the appealability of the order for the decision of the Court of Review. (See petition for *mandamus*, R. 12). But it seems clear, upon reason as well as authority, that where no appeal lies the District Judge may refuse to allow it.

> *In re* Durrant (C. C.), 84 Fed., 317;
> Southern Building & Loan Association vs. Carey (C. C.), 117 Fed., 325, 327.

It is idle to grant an appeal where, consistently with the recognized rules of law, the appellate court can do nothing but dismiss the appeal when perfected. And so it appears to have been an ordinary practice for the lower Court to deny an appeal if in the opinion of that Court the applicant is not entitled thereto, leaving him to apply for a review of the decision through the medium of petition for the writ of *mandamus*. This practice was pursued in the leading

case, *Ex-parte* CUTTING, 94 U. S., 14, 19-22, to which reference is above made, and in FINK vs. BAY SHORE TERMINAL Co., (C. C. A., 4th Circuit), 144 Fed., 837, 838.

VI.

THE LEVEE BOARD ACTED IN UNQUESTIONED GOOD FAITH IN ENTERING INTO THE COMPROMISE OF JULY 11, 1913; AND, INASMUCH AS THE PUBLIC INTERESTS IN THESE LANDS WERE CONFIDED BY LAW TO THAT BODY, IT IS CLEARLY WITHIN THE DISCRETION OF THE TRIAL COURT TO DENY TO ALL OTHERS THE RIGHT TO INTERVENE AND APPEAL.

The petition for leave to intervene and appeal proceeds, apparently, upon the ground that the Levee Board has failed in its duty in that it has seen fit to compromise the litigation, whereas in the opinion of the Honorable Attorney General the same ought to have been prosecuted to final conclusion. But the good faith of the Levee Board in entering into the compromise of July 11, 1913, is not questioned. This is shown affirmatively in the return of the District Judge, as well as by the entire absence from the record of any claim which reflects upon the honesty or good faith of the Levee Board. Neither in the objections of the Attorney General to the dismissal of the suit (R. 62-63), nor in the petition for leave to intervene and appeal (R. 5-8), nor elsewhere in the record, is it claimed that the Levee Board acted otherwise than in the most perfect good faith and in the exercise of the best judgment of its members in entering into the act of compromise.

In paragraph 19 of the return of the District Judge it is said (R. 32):

> "In the exercise of its best judgment, and with much apparent deliberation, the Levee Board has seen fit to compromise the existing suit, and in my opinion it had full power and authority so to do. That the Levee Board in entering into the compromise acted in the utmost good faith, and as it deemed for the interest of the taxpayers and inhabitants of the Levee District, was not questioned in any showing made by the Honorable Attorney General before me."

In paragraph 26 of the return the District Judge says (R. 36-37):

> "It does not appear from anything shown in the court below that the compromise was in any respect against the best interests of the Levee District, nor that the Levee Board was wrong in its conclusion that the act of compromise, carrying with it the payment of $100,000 was fitly to be preferred to the hope of gaining, balanced by the fear of losing, in said litigation. From the act of compromise it appears that on a former occasion—viz., on or about the 9th day of July, 1903—an act of compromise with reference to the lands mentioned in the the bill of complaint had been entered into by said Levee Board, acting through its president, W. H. Holloman, under authority of resolution of said board, dated the 9th day of July, 1903, with the Tensas-Delta Land Company, Limited, and such former act of compromise was, by the act of compromise of date July 11, 1913, ratified and confirmed. Under all the facts appearing in the record it might well be deemed by the members of said Levee Board to be a prudent act, in the interest of their constituents, to enter into the compromise aforesaid, and thereby acquire for the Levee District the benefits thereof, and it has at no time been claimed before me by the Honorable Attorney General, or by anybody else, that said members of the Levee Board acted otherwise than in the utmost good faith in the compromise so made by them."

Under these circumstances, it was clearly within the discretion of the trial Judge to deny to the State of Louisiana leave to intervene and appeal, especially when application for such leave was not made until nearly six months after the final decree of dismissal.

Land Title & Trust Co. vs. Asphalt Co. of America (C. C. A.), 127 Fed., 1, 21, 22;

Fink vs. Bay Shore Terminal Co. (C. C. A.), 144 Fed., 837, 838;

Thomasson vs. Guaranty Real Estate Co. (C. C. A.), 159 Fed., 126.

In LAND TITLE & TRUST CO. VS. ASPHALT CO. OF AMERICA, 127 Fed., 1, 21, 22 (C. C. A., 3rd Circuit), it is said by Circuit Judge Gray:

"The application to intervene, in both the first and third appeals, was broadly upon the ground that the party by whom the interests of the intervenor should be represented (in the one case the Land Title & Trust Company, trustee, and in the other the receivers), was not representing such interests properly. No individual or separate interest of the petitioner, which could not otherwise be adjusted at all, and would therefore be lost if intervention were denied, was presented in the court below in either of the petitions which are the subjects of the first and third appeals. *If the trustee and the receivers act honestly and in good faith, the rights of the appellant are protected.* The trustee has important interests committeed to him by his *cestuis que trustent* in the litigation before the Court, and the Court was right, both as to the trustee and the receivers, in exercising its discretion to protect them from interference, in the carrying on of the litigation and the administration of the funds in hand, as attempted by appellant's petition for intervention. *If the trustee had acted in bad faith, or fraudulently, it was open to the appellant to proceed by original bill,* and if the receivers have been guilty of malfeasance in office, the proper remedy is an application to the Court below by the appellant or other party in interest, for their removal and the substitution of others."

In FINK VS. BAY SHORE TERMINAL CO., (C. C. A., 4th Circuit), 144 Fed., 837, 838, application was made by *mandamus* to compel the Court below to permit a bondholder to intervene and appeal. In the opinion of Circuit Judge Goff it is said:

"No special cause was assigned by him, as a reason why such permission should be granted, save only that his rights were not fully protected by the decree of which he complained. No fraud is charged against the trustee, no collusion between the trustee and other bondholders, or other parties, is alleged, and no cause is shown by petitioner from which the Court could find that the refusal of the trustee to appeal from said decree was not entirely proper and justified by the interests represented by it. Under these circumstances the Cir-

cuit Court, exercising its judicial discretion, refused the request of petitioner, and declined to permit him to become a party to said cause.

"It was not the positive duty of the Court below to permit the petitioner to become a party to said cause. That Court has not declined to discharge any duty imposed upon it, so far as the petitioner is concerned, but it has held that *as he is already represented in said litigation by the party duly selected for that purpose—the trustee in the mortgage, it would not be proper under the rules of procedure applicable to such matters, to permit him individually to intervene, and antagonize the trustee* in the discharge of his common duty to all the bondholders. No appeal lies from such discretionary action of the court below. To hold otherwise would create inextricable confusion in judicial proceedings, and render it almost impossible to terminate litigation of the character involved in this cause. Petitioner not having been made a party, was not entitled to an appeal from the decree complained of, and, not being so entitled, the writ of *mandamus* must not issue compelling the Court below to grant him an appeal."

In ELWELL VS. FOSDICK, 134 U. S., 500, a holder of $14,000 out of $955,000 of railroad bonds, secured by mortgage, was permitted by the Circuit Court to appeal to the Supreme Court in the name of the trustee in the mortgage, from a decree which it was claimed affected the interest of such holder. It appearing that some time before the appeal was taken the trustee had executed a release of his right to appeal and of errors in the decree, and that the Court had in the decree found that there was no proof showing that the trustee had not acted in good faith, it was held that the release bound all the bondholders represented by the trustee; that the appeal was the appeal of the trustee; and that, on motion of the appellee, it must be dismissed.

In the petition for *mandamus* (p. 24) counsel quote an excerpt from the opinion of the Supreme Court of Louisiana in STATE VS. TENSAS-DELTA LAND COMPANY, LIMITED, 126 La., 59, 72, as follows:

"If the governing body of one of these corporations fails in its duty to bring a suit which clearly it ought to

bring, the Courts may—only, however, under highly exceptional circumstances—allow any citizen or taxpayer of a district to bring the suit; and in such a case the same privilege might for the same reason be extended to the State. But nothing of that kind is pretended in this case. There is no suggestion that the Board of Commissioners of the District has failed to bring suit, or is unwilling to do so. In fact, this Court knows the contrary from the public prints."

The passage thus quoted, it is evident, has reference to a case where the Levee Board, acting fraudulently and collusively, omits to bring suit to redress a wrong sustained by it. So considered, it is in precise harmony with the decisions of the Federal Courts, to which attention is above called. In such case—or as the State Supreme Court expresses it, "*only, however, under highly exceptional circumstances*"—a citizen or taxpayer may bring suit; and it is suggested that perhaps the State may do so. But clearly the suit at bar does not present such a case. The Levee Board has not fraudulently or collusively refused or omitted to act. It has in fact acted. In the exercise of its best judgment and with the utmost deliberation and good faith, the Levee Board compromised the pending suit.

LAND TITLE & TRUST CO. VS. ASPHALT COMPANY OF AMERICA, *supra*, and the other cases herein cited, are authority to the following effect:

First.—If the Levee Board acted honestly and in good faith in entering into the act of compromise, the public is fully protected, and no right of intervention in others exists.

Second.—If the Levee Board acted in bad faith or fraudulently in entering into the act of compromise, it is open to one who is injured thereby to proceed by original bill, and hence he is not entitled to insist upon the right to intervene.

BOARD OF LIQUIDATION OF THE CITY DEBT OF NEW ORLEANS VS. LOUISVILLE & NASHVILLE RAILWAY CO., 109 U. S., 221, is also a case to the point that the compromise between the Levee Board and the Land Company will not be disregarded in this court. There a question arose on the presentation of an order by the authorities of the City of New Orleans to dismiss a suit in the Supreme Court of the United States, in which the city was plaintiff in error. The order was based on a compromise between those authorities

and the railroad company, which the Board of Liquidation, intervening in the Supreme Court, alleged to be *without authority and fraudulent*, the Board of Liquidation itself claiming the land in controversy and that the city had no power, by its compromise, to dispose of the same. The Supreme Court did not disregard the compromise or the order of the city to dismiss the case, but thought the dispute as to the authority of the Mayor and Council presented questions too important to be settled summarily on motion, and ordered the motion to be continued to a subsequent term of the Supreme Court, when the appeal would be dismissed, in accordance with the stipulation, unless the Board should begin and prosecute without unnecessary delay in some court of competent jurisdiction an appropriate suit to set aside the compromise. Such independent suit was thereupon begun, and when the same was decided in favor of the action of the Mayor and Council, the suit was dismissed in the Supreme Court on the basis of the compromise order.

The above case is explained and followed in the case of DAKOTA COUNTY VS. GLIDDEN, 113 U. S., 222, 226, and points out the only course which it is within the province of the State of Louisiana to pursue—if, indeed, it is entitled to pursue any legal remedy whatsoever—because of the alleged grievances set forth in the petition. This Court assuredly will not, upon application for writ of *certiorari* to review the denials of the courts below, disregard the act of compromise. If the State of Louisiana desires to attack the compromise in an effort to set aside the same, such attack can be sustained, if at all, only in case it charges and proves that the act of compromise was fraudulently and collusively made between the Levee Board and the Land Company, and that serious injury has thereby resulted to the State. It is possible that a taxpayer of the Levee District might be able to maintain a suit upon such theory; but as the good faith of the Levee Board stands out in bold relief upon this record, there is no room for the application of this theory in the instant cause.

VII.

THE CIRCUMSTANCE THAT DURING THE PENDENCY OF THE SUIT BROUGHT BY THE LEVEE BOARD, THE ATTORNEY GENERAL WAS SOLICITOR OR COUNSEL OF RECORD FOR THAT BODY, DOES NOT GIVE HIM THE RIGHT TO APPEAL THE CAUSE OR CARRY ON THE LITIGATION CONTRARY TO THE WILL OF HIS CLIENT, THE LEVEE BOARD.

When the motion was made by the Land Company in the court below to dismiss the cause, the Attorney General made written objections thereto. These were not presented in behalf of the State, but were the objections of "R. G. Pleasant, Attorney General, State of Louisiana, and Attorney of Record for Complainant" (R. 63).

Subsequently, when application was made for leave to intervene and appeal, it was made by the Attorney General in the name and ostensibly in behalf of the State of Louisiana. No authority, however, to make such application is shown, save such as may be inferred from the fact that Mr. Pleasant filled the office of Attorney General or appeared as solicitor or counsel for the Levee Board in its suit.

Whether the objections to the settlement of the suit be treated as objections of the State of Louisiana or the objections of the solicitor or counsel for the Levee Board, they are equally futile. By the act of compromise the suit was settled. There is no subsisting cause of action in favor of the Levee Board against the Land Company. Hence, it is not within the power of the Attorney General to carry on the litigation, and no right of appeal exists.

SAN MATEO COUNTY VS. SOUTHERN PACIFIC RAILWAY CO., 116 U. S., 138, was a suit by the county against the railroad company to recover taxes. Judgment was rendered upon demurrer in favor of the defendant, and the suit dismissed. Thereupon a writ of error was sued out to review the case in the Supreme Court. After the suit was docketed in the Supreme Court, the railroad company paid into the treasury of the county the entire sum claimed by the county to be due. Notwithstanding the settlement between the parties, the attorneys of record for the county proceeded to carry on the suit. This was for the apparent reason that the suit was a test case upon the decision of which other

causes depended. The Court entertained a motion to dismiss the writ of error made by counsel specially appointed by the Board of Supervisors of the county for that purpose. Upon the suggestion that counsel of record desired to oppose the motion, an order was made that notice be given to them to appear and show cause against it if they desired to do so. But the motion being heard, the writ of error was dismissed in the Supreme Court. The ground of dismissal is said by the Supreme Court to be:

> *"For the reason that there is no longer an existing cause of action in favor of the county against the railroad company."*

There is no longer a dispute between the parties to the suit in the District Court. By the act of compromise of July 11, 1913, that dispute has been ended, and the conveyances made November 9, 1898, by the Levee Board to the Land Company have been ratified and confirmed.

If *mandamus* should be granted and the cause heard in the Circuit Court of Appeals on appeal from the decree made by Judge Boarman dismissing the suit, it would be impossible for that Court on the record thus made up to grant any relief against the express act of the Levee Board ratifying the sale and consenting to the dismissal of the suit. No relief could be granted against the act of the Levee Board in ratifying the sale and consenting to the dismissal of the cause unless fraud in the compromise were shown, and, as we have seen, there is not even a pretense that the Levee Board, in making that compromise, acted in bad faith.

Upon the record as it now stands the case as presented by the Honorable Attorney General to this Court is a moot case, involving no real issue or controversy between the parties litigant. The rule in such case is that no appeal will be allowed, or, if appeal be taken, it will be dismissed in the appellate court.

Little vs. Bowers, 134 U. S., 547;
California vs. San Pablo, etc., Railroad Co., 149 Id., 308;
Mills vs. Green, 159 Id., 651, 653, 657, 658;
New Orleans Flour Inspector vs. Glover, 160 Id., 170;
Kimball vs. Kimball, 174 Id., 158, 161;
American Book Co. vs. Kansas, 193 Id., 49;

Jones vs. Montague, 194 Id., 147;
Fisher vs. Baker, 203 Id., 174;
Lewis vs. Wyman (C. C.), 168 Fed., 756, 758, 759.

In Little vs. Bowers, 134 U. S., 547, 557, it is said:

> "It is well settled that when there is no actual controversy involving real and substantial rights *between the parties to the record*, the case will be dismissed."

In CALIFORNIA VS. SAN PABLO, ETC., RAILROAD CO., 149 U. S., 308, while a writ of error was pending to reverse a judgment for the defendant in an action by the State to recover sums of money for taxes, the defendant offered to the plaintiff and deposited in a bank to its credit the amount of those sums with penalties, interest and costs. This by the statute of the State had the same effect as actual payments and receipt of the money. This fact as to the tender and deposit was admitted by the Attorney General in his brief. Mr. Justice Gray, in the opinion of the Court said (pp. 313, 314):

> "Upon the fact most properly and frankly admitted in open court by the Attorney General of the State of California, there can be no doubt that this writ of error must be dismissed because the cause of action has ceased to exist. Any obligation of the defendant to pay to the State the sums sued for in this case, together with interest, penalties and costs, has been extinguished by the offer to pay all these sums and the deposit of the money in a bank which, by a statute of the State, have the same effect as actual payment and receipt of the money. And the State has obtained everything that it could recover in this case by a judgment in this court in its favor. The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When in determining such rights it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the Court is not empowered to decide moot questions or abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipu-

lation of parties or counsel, whether in the case before the Court or in any other case, can enlarge the power or affect the duty of the Court in this regard."

In the latter cases in the Supreme Court of the United States to which we have referred above, there is quoted with approval the rule as declared by Mr. Justice Gray in MILLS vs. GREEN, 159 U. S., 651, 653:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower Court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact when not appearing on the record, may be proved by extrinsic evidence."

Reliance is had by the Attorney General in his petition upon Act No. 3 of the Extra Session of the Legislature for the year 1910. This act makes it the duty of the Attorney General of the State of Louisiana, upon request of the Governor, to represent any political agency or subdivision of the State in any suit in any court, involving title to any land or real property belonging to any such political agency. The act reads as follows:

> "That it is hereby made the duty of the Attorney General of the State, upon the request of the Governor to represent the State or any political agency or subdivision thereof, in any suit in any court involving title to any land or real property belonging to the State of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the State or in the name of any of its political agencies or subdivisions."

The above act, it will be noted, merely gives the Attorney General, upon request of the Governor, power to act as counsel for the State, or any subdivision of the State, in land litigations. Whatever power the Attorney General has, he derives from some statute of the State.

Railroad Tax Cases (C. C.), 136 Fed., 233.

As was said in STATE OF LOUISIANA VS. GRAHAM, 25 La. Ann., 434:

> "The Attorney General is not the State, but only the counsel for the State. His agreement to acquiesce in a judgment is not the acquiescence of the State; nor does it bind a succeeding Attorney General not to take an appeal where he believes it to the interest of the State to do so and the time for appealing has not elapsed."

This proposed intervention is in form the intervention of the State of Louisiana. In reality it is the intervention of the Attorney General, for that officer assumes to take this action upon his own motion, and not by the direction of any higher State authority. If the Attorney General can continue this litigation against the will of the Levee Board, it logically follows that the ultimate power of disposition of the lands rests in him, not in the Levee Board, for to continue the suit is to rescind the act of compromise into which the Levee Board has entered.

By his act in seeking to continue the litigation, the Attorney General therefore arrogates to himself the ultimate authority over these lands, an authority which it has been solemnly adjudged by the Supreme Court of Louisiana the State itself does not possess. If these pretensions be the law, then truly the servant is greater than the master.

This contention, however, finds no support in judicial precedent.

In SMITH VS. VICKSBURG, S. & P. R'Y Co., 112 La., 985, a compromise was entered into between plaintiff and defendant and the attorneys of the plaintiff attacked the compromise on the ground that it was made in bad faith and by collusion. The Court said:

> "Defendant is to be considered as any other third person not prohibited by law from entering into a compromise with its creditors. The moral side of the question is not before us, nor the consideration of that which

a careful business man, anxious to see that every one receive his own, would have done under similar circumstances. But this does not create a legal tie between the attorneys here and the defendant company. * * *

" 'We know of no law giving an attorney-at-law a privilege on a judgment not yet in existence, and no law to compel a party to prosecute a suit to a judgment in order that the attorney in the suit may obtain and enforce a privilege on the said judgment for his professional services. The plaintiffs having compromised their suit against the defendants (which they had a right to do) and demanded its dismissal, it was at an end, and there is no suit in which an intervention can be maintained.' "

Citing RIND vs. HUNSICKER, 24 La. Ann., 572.

It will be borne in mind that after the act of compromise was made, and under date of July 19, 1913, the secretary of the Levee Board, by order of that body, wrote to the Attorney General instructing him, as attorney representing the Board, to dismiss the suit of BOARD OF LEVEE COMMISSIONERS OF THE TENSAS-BASIN LEVEE DISTRICT vs. TENSAS-DELTA LAND COMPANY, LIMITED, No. 694 on the docket of the United States District Court for the Western District of Louisiana, at the cost of plaintiff. (See letter in transcript, pp. 70-71). The question presented is, therefore, analogous to that presented in IKERD vs. BORLAND, 35 La. Ann., 337, 338, where it is said by the Court:

"The right here asserted is not merely to resist the dismissal of an appeal taken by the client, but actually to take an appeal by giving bond in the name of his client against the latter's will and orders."

The Supreme Court of Louisiana did not uphold the right asserted, but declared that an attorney-at-law who has been discharged by his client cannot, against the will and orders of the latter, give bond and prosecute an appeal in his name, and that an appeal so taken will be dismissed on motion of the client.

In the later case, VOELKEL vs. SUCCESSION OF AURICH, 118 La., 526, it is held that where an attorney for a litigant moves, as such attorney, for an appeal from a judgment against his client, and it is not pretended that the attorney

personally has any appealable interest, the appeal will be dismissed, as the Court is obliged to notice, of its own motion, the absence of the proper parties, since it has no authority to adjudicate the rights of persons who are not before it, or of persons who have no rights before it. The converse of this proposition is recognized in KEOUGHAN VS. OIL CO., 116 La., 773, where it is held that after a judgment an attorney-at-law, under the general authority from his client to act in the case, is without authority to make a gratuitous waiver of appeal.

If an appeal lies from the decree entered by Judge Boarman dismissing the bill, that appeal, under the foregoing authorities, lies at the instance of the Levee Board, and no one else. It is evident, however, that the Levee Board is not entitled to appeal, inasmuch as the decree was entered with its consent. No appeal having been taken by the Levee Board, in no event will counsel be heard in its behalf in the Appellate Court. This principle is recognized in FITCHIE VS. BROWN, 211 U. S., 321, 328, 329. In that case executors were parties to the action, but did not appeal. Counsel for the executors claimed the right, however, to be heard in the Supreme Court. Mr. Justice Peckham, in the opinion of the Court, said:

> "The counsel for the executors of the testator, appellees herein, was permitted in this court to file a brief and was heard orally on the argument before us, although no appeal from the decree had been taken by the executors. This Court stating, however, that it would thereafter decide whether counsel for executors had any right to be heard to contend against the decree of the Court below. * * *
>
> "We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients."

VIII.

THE LAW FAVORS COMPROMISE OF DISPUTED CLAIMS AND THE CIVIL CODE OF LOUISIANA MAKES EXPRESS PROVISION THEREFOR.

Divers claims of the respective parties were in dispute between them in the court below. The Levee Board filed its bill seeking to rescind the sale to the Land Company, made November 9, 1898, setting up, as grounds therefor, fraud in the sale, disguised donation and lesion. The Land Company denied all charges thus made and insisted upon the validity of the sale.

While the cause was pending for trial on the merits, the parties to the suit saw fit to compromise the same. In thus entering into the act of compromise, they dealt with each other on terms of equality. They held no relation of trust or confidence one to the other. Each had knowledge, or the opportunity to acquire knowledge, of every fact bearing upon the validity of their respective claims. A compromise made under such circumstances is within the power of the parties and favored by the Courts and invariably upheld by them.

Hennessy vs. Bacon, 137 U. S., 78;
Cleveland vs. Richardson, 132 U. S., 318, 329;
Hager vs. Thompson, 1 Black, 80;
Chicago & Northwestern Railway Co. vs. Wilcox (C. C. A.), 116 Fed., 913, 914.

In HENNESSY VS. BACON, 137 U. S., 78, 85, in the opinion of the Court, by Mr. Justice Harlan, it is said:

> "It is the case of the compromise of a disputed claim, the parties dealing with each other upon terms of perfect equality, holding no relation of trust or confidence to each other, and each having knowledge, or having the opportunity to acquire knowledge, of every fact bearing upon the question of the validity of their respective claims. (Cleveland vs. Richardson, 132 U. S., 318, 329). Such a settlement ought not to be overthrown, even if the Court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained."

The rule is thus stated by Circuit Judge Sanborn in the opinion of the Circuit Court of Appeals of the Eighth Circuit, in CHICAGO & NORTHWESTERN RAILWAY CO. VS. WILCOX, 116 Fed., 913, 914:

> "The policy of the law has always been to promote and sustain the compromise and settlement of disputed

claims. It loves peace, hates broils and dissensions and discourages the prolongation of litigation and the revival of controversies which have once been closed. The judgment of a Court settles the claims submitted to it and estops the parties from again litigating them after they have been adjudicated. In the absence of fraud or mistake, executed agreement of settlement of an unliquidated disputed claim constitutes as conclusive and as effectual an estoppel against the parties to the compromise from again litigating the claim thus settled as the final judgment of a Court of competent jurisdiction to the effect that the rights of the parties are as they are set forth in the agreement, and such a contract is always upheld by the Courts."

The Civil Code of Louisiana defines a transaction or compromise and makes specific provision for ending lawsuits by the execution of such instruments as that now before the court.

Article 3071 of the Civil Code reads:

"A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

"This contract must be reduced into writing."

Thus it is seen there are three elements which go to make up a transaction or compromise: There must be differences between two or more persons in respect of which a lawsuit is contemplated or exists or may be brought; the parties must agree upon the terms of adjusting such differences; the contract must be reduced to writing. The document presented to the Court below, constituting the act of compromise of July 11, 1913, is correct in form, and embraces every element which goes to make up a transaction or compromise within the above definition of the Louisiana Civil Code.

Litigation was pending between the parties. They agreed, after thorough discussion, to adjust their differences. They reached an amicable agreement which each was willing to accept and preferred to the hope of gaining, balanced by

the danger of losing. Complainant was willing to accept $100,000 and ratify and confirm defendant's title to the property in controversy. Defendant was willing to give the $100,000 and have its title ratified and confirmed. The contract of compromise was reduced to writing and executed before a Notary, with two witnesses.

Who, then, has the right to enter into a contract of compromise, or make a transaction of this character? Article 3072 of the Civil Code of Louisiana reades as follows:

> "A man to transact must have the capacity to dispose of the things included in the transaction."

Some of the powers vested by statute in the Levee Board have already been noted in Division III. of this argument. We have there seen that the title to the lands was vested by the State of Louisiana in the Levee Board; that there was likewise conferred upon the Levee Board the power to alienate without limit; and that the Levee Board was also invested with the authority to sue and be sued in its corporate name.

The power to alienate the lands without limit necessarily involves the power to compromise a pending suit respecting the lands. The case is brought within the direct terms of Article 3072 of the Civil Code, which declares that a person, in order to transact must have the capacity to dispose of the things included in the transaction.

Again, as we have seen, Section 3 of Act 59 of the Laws of 1886, creating the Levee Board and defining its powers, expressly invests it with power to sue, and this necessarily implies the power to compromise and end the suit begun. We venture to say that the power to begin and conduct a suit, without the power to end it, never yet was conferred upon a corporate body.

The power to compromise litigation follows by necessary implication from the power to sue and defend, in the case of municipal or public corporations just as in others.

> Board of Commissioners of Drislow County vs. Tollman (C. C. A., 4th Cir.), 145 Fed., 753, 772.

The Civil Code declares what may be embraced within the terms of a transaction or compromise. Article 3073 reads:

"Transactions regulate only the differences which appear clearly to be comprehended in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them.

"The renunciation, which is made therein to all rights, claims and pretensions, extends only to what relates to the differences on which the transaction arises."

This article, it will be perceived, provides for special compromises wherein the parties adjust particular differences that exist between them as contra-distinguished from general compromises provided for by Article 3083 of the Code, wherein parties compromise generally on all differences which they may have had with one another, the titles which they then know nothing of and which are afterwards discovered, etc.

In the particular instance submitted to the Court below, the compromise comes within the terms of Article 3073 above quoted, and is intended to, and does, clearly adjust and settle, as therein stated, all the differences existing between the parties as set forth in the bill of complaint and amended bills of complaint filed in the suit, and forever sets at rest all questions relating to the validity of the titles of the Tensas-Delta Land Company, Limited, to the lands situate in the eight parishes mentioned in the bill.

Article 3078 of the Civil Code declares the effect of such a compromise. It reads:

"Transactions (compromises) have, between the interested parties, a force equal to the authority of things adjudged. They cannot be attacked on account of any error in law or any lesion. But an error in calculation may always be corrected."

The term "thing adjudged" is defined by the Civil Code of Louisiana, Article 3556, paragraph 31, as follows:

"Thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or

> because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal."

The Civil Code makes provision for the rescission of a transaction or compromise, but it may not be done in the manner attempted by the Attorney General in the instant cause. Article 3079 reads:

> "A transaction may be rescinded notwithstanding, whenever there exists an error in the person or on the matter in dispute. It may likewise be rescinded in the cases where there exists fraud or violence."

Nowhere in the record in the suit at bar is it claimed or intimated that there exists an error on the matter in dispute, or that there exists any fraud or violence in the consummation of the transaction. In such case only would there exist a reason in law for setting aside the transaction or compromise, and then it could be done only at the instance of one of the parties thereto, or some one having a legal interest therein.

IX.

The Fact That the Bill of Complaint Charges Fraud in the Sale Made by the Levee Board on November 9, 1898, Does Not Take Away the Right of the Levee Board to Compromise the Suit.

In its bill of complaint and amended bills of complaint the Levee Board sought to avoid the sale made to the Land Company on November 9, 1898, charging fraud in the sale, disguised donation and lesion. The objections of the Attorney General to the dismissal of the suit (Record, 62-63), and likewise his petition for leave to intervene and appeal (Record, 5-8), assume that there was in fact fraud in the sale made by the Levee Board in the year 1898, and from this it is argued that the parties ought not to be permitted to compromise a fraud. No such facts were shown before the District Judge. On the contrary, it appears from the record that all charges of fraud or wrong-doing were denied by defendant Land Company under oath in an answer filed in support of the demurrer, which answer appears on pages

131 to 141, inclusive, of the printed record in this cause, and was verified by the Honorable F. G. Hudson, late of Monroe, La., now deceased, who was then acting as the duly appointed legal agent of the Land Company.

It thus appears that fraud in the sale was charged by complainant and denied under oath by defendant; and it is gravely argued by the Attorney General that, fraud being charged, the compromise cannot stand, for the reason that it is against public policy to allow the compromise of a fraud. If the mere fact that fraud is charged, although not proved, prevents the compromise of suits, it results that a large proportion of the suits begun in our various courts, State and Federal, are placed beyond the possibility of compromise by mutual agreement of the parties, because nothing is more common in litigation than for a party conceiving himself to be aggrieved, to charge fraud against his adversary.

The Attorney General assumes in his objections and petitions to declare in what the public policy of Louisiana consists. But, as said by the Supreme Court of the United States in the GIRARD WILL case, the public policy of a State is to be found in its Constitution, laws and judicial decisions, and we are not to look beyond those to general considerations of supposed public interests. It is added by Mr. Justice Story, in the opinion of the Court:

> "The question what is the public policy of a State and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty and to involve discussions which scarcely come within the range of judicial duties and functions and upon which men may and will complexionally differ."
>
> VIDAL VS. GIRARD'S EXECUTORS, 2 How., 127, 197, 198.

Confining, then, the consideration of this question of public policy to what is found in the Constitution, statutes or judicial decisions of Louisiana, it will be seen that the contention that this compromise is against the public policy of the State is wholly destitute of foundation. We are aware of nothing in the Constitution, statutes or judicial decisions of Louisiana which takes from the Levee Board and places in the Attorney General the ultimate power of disposition of these lands. On the contrary, the statutes of Louisiana expressly vest in the Levee Board the title to

these lands, the power without limit to alienate the same, and the power to sue in respect thereto.

Moreover, the Civil Code of Louisiana expressly contemplates that a transaction or compromise may embrace and settle differences between the parties, even though fraud is charged. Article 3080 is as follows:

> "A transaction may also be rescinded, when it has been made in execution of a title which is null, unless the parties have expressly compromised on the nullity."

This is a negative pregnant and intends the affirmative. A common instance of a title which is null is the case where the title is based on fraud. The clear intendment of this article is that, if the nullity charged or existing grows out of fraud, and with full knowledge and appreciation thereof, the parties expressly compromise on the nullity, the transation or compromise is effective in law in like manner as if made in respect of any other matter of difference.

In Russ vs. Union Oil Co., 113 La., 196, 205, it is said:

> "There is no rule of law, morals or ethics which denies to the ordinary citizen the right to compromise, with a person asserting it, a claim against him for damages; * * * and, when the compromise is effected in the manner provided by law, it has the force of the thing adjudged and cannot be attacked collaterally, or for error of law or lesion, in a direct action."

Again in Turregano vs. Barnett, 127 La., 620, it is said:

> "A settlement of business transactions where, with full knowledge of all material facts, money is accepted and a receipt in full given, will not be disturbed, in the absence of allegation and proof of error or fraud."

The Louisiana case most nearly parallel to the case at bar is State vs. Hackley, Hume & Joyce, 119 La., 482. Suit was brought by the State of Louisiana against Hackley, Hume & Joyce to recover lands in Tangipahoa Parish. It was charged that the lands had been fraudulently entered and patents therefor from the State fraudulently procured. The District Attorney was authorized by the Governor to bring suit, and brought the same accordingly. Subsequently

a tentative compromise was entered into between Hackley, Hume & Joyce and the Governor, wherein it was proposed amicably to adjust the issues in suit and settle by compromise the title to the lands in consideration of the payment to the State of the sum of $27,447.12. This proposition it was proposed to submit to the General Assembly at its session of 1908. The District Attorney refused to stay proceedings in the suit at the request of the Governor, for reasons sufficient unto himself. Whereupon the Governor requested the Attorney General to file a motion to stay the proceedings until the Legislature might have opportunity to pass upon the proposed compromise. This motion was made and granted by the trial Court, and thereupon the District Attorney applied to the Supreme Court for writs of *certiorari* and *mandamus*, insisting upon his authority to continue in the prosecution of the suit brought by him in the name of the State, notwithstanding the stay obtained by the Attorney General. The Supreme Court denied the writ of *mandamus* asked, saying:

> "The General Assembly should be given the opportunity to consider questions that here arise in regard to these lands. They doubtless will settle upon such action as will protect the State."

In the instant cause the Levee Board possessed the same power over the lands in controversy, and the right to compromise a suit respecting the same, as was possessed by the State of Louisiana in respect to the lands involved in the Hackley, Hume & Joyce suit, and if it was proper for the General Assembly to compromise the cause reported in the 119th Louisiana, notwithstanding fraud in the acquisition of the lands was claimed, it was clearly within the power of the Levee Board to compromise the issues involved in the suit at bar.

In ANTOINE VS. SMITH, 40 La. An., 560, suit was brought for the recovery from the defendant of two hundred shares of the capital stock of the Louisiana State Lottery Company. Plaintiff had become possessed of these shares, but being "engaged in politics," the circumstance that he held the shares was concealed by causing them to be placed in the name of another. The cause of the contract and the motive of the transfer were intrinsically illegal and opposed

to good morals and public policy, and with reference thereto the Supreme Court of Louisiana went so far in its opinion as to declare:

> "That such contracts cannot be enforced has been held in very many opinions of this Court and its predecessors, is evidenced by the following cases (Citing authorities).
>
> "But, however much we may reprobate such scandalous transactions; however much we may feel constrained, for decency's sake, to summarily eject the plaintiff from the portals of the temple of justice, it is our deliberate opinion that it cannot be done in the present attitude of this affair."

Notwithstanding the intrinsic illegality of the contract, the Court, under Article 3071 of the Civil Code, upheld the transaction or compromise between the parties relative to the subject-matter of the litigation, holding that the only essential as a matter of form, which that article requires, is that the contract of compromise must be reduced to writing.

An analogous rule is laid down in CALHOUN vs. LANE, 39 La. An., 594, 599, where the Court upholds a compromise between two forced heirs to the succession of their mother, which had the effect of binding a married woman's property for the debt of her husband. The Court said:

> "It cannot be contested that a married woman has the right to compromise a lawsuit against herself, or to make a transaction for the purpose of preventing a lawsuit against herself; and transactions have between the parties a force equal to the authority of things adjudged."

OGLESBY vs. ATTRILL, 105 U. S., 605, was a writ of error to the Circuit Court of the United States for the District of Louisiana. It was sought by defendants to enforce a reconventional demand or counterclaim against plaintiffs, because of the fraud of plaintiff and his associates in causing assessments to be levied on corporate shares owned by defendants, whereby such shares were lost. It appeared, however, that the parties had entered into a compromise in substantial accordance with Article 3071 of the Civil Code of Louisiana. It is said by Mr. Justice Field, in the opinion of the Court (pp. 610-611):

"The suits between the defendants and the Crescent City company involved the validity of the assessment which they, on account 'of frauds and machinations of the officers,' sought to enjoin, whilst the company sought to enforce its payment. The compromise concluded embraced the dismissal of the several suits—of those brought against the defendants and the one brought by them against the company—the transfer of their stock, and their release from present and future assessments thereon. There is no averment that it was induced by any false representations of the plaintiff or of the directors, or that the assessment was not a genuine one, or that the agreement of the directors that no assessment should be levied on their stock was carried into effect; or that there was any concealment of the affairs of the company; and of the value of the stock the defendants were as competent to judge as any others in the market. * * * The compromise stands, therefore, as a judgment, making a settlement of the very matters now set up as grounds of complaint in the petition in reconvention; that is, 'the frauds and machinations of the officers of the company' in levying the assessment. It settled all claims arising from the assessment, and the alleged fraudulent purposes of the officers in connection with it. Though made directly between the company and the defendants, it protects from further suit those who advised, equally with those who levied, the assessment; participants in whatever wrong was committed, if any there were, as well as principals; abettors as well as doers of it. *No allegations of fraud in addition to those made at the settlement, can prevent the compromise from having effect as a judgment thereon.* It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally. (ADLE VS. PRUDHOMME, 16 La. An., 343). In the face of the compromise, the reconventional demand cannot be sustained."

From the foregoing authorities it results that it is not against the public policy of the State of Louisiana to compromise a suit in which the issue of fraud *vel non* is involved. As we have already seen, the Levee Board, as respects the

lands in controversy, was possessed of the power to alienate without limit. An unlimited power to sell necessarily involves the power to compromise a suit with respect to the lands. The greater includes the less.

The Attorney General insists (petition, R. 15) that the compromise is to be treated as a sale of the lands, and that it is irregular because the lands were not duly sold to the highest bidder for cash under Act No. 215 of the General Assembly of Louisiana of 1908. There is no merit in this contention. The lands, when sold in November, 1898, were exposed at public sale to the highest bidder. In July, 1913, when the act of compromise was made, the Levee Board did not assume to sell the lands but merely to compromise a litigation which involved the mere possible right to recover the same.

An argument like that now made by the Attorney General was addressed to the Court in CALHOUN vs. LANE, 39 La. An., 594, 599. The Court said:

> "Assuming the agreement to be a sale and not a compromise, defendant's counsel further argues that it is void, for the reason that a married woman is not permitted to purchase property on terms of credit on her separate account, unless she is possessed of adequate means to discharge her obligations from her own resources.
>
> "While that is true as a general proposition, the principle is not properly invoked here. We have already ascertained that the agreement is not a sale; but it is one by which a *previously* existing title of defendant is recognized and affirmed."

Neither is there merit in the suggestion that a different rule should apply because the Levee Board is a public body, a municipal corporation. No such distinction exists upon either reason or authority. From time immemorial the Government, as well as municipal corporations, have been wont to compromise embezzlements and other frauds of public officers. When such compromise is confined to the civil liability, the power or propriety of the act has not been questioned in courts of justice.

In UNITED STATES vs. KNABE (C. C.), 147 Fed., 802, a compromise was made with the sureties on the bonds of

certain defaulting officers of the United States. The Court said (p. 806):

> "The law favors compromises and settlement of disputed property and pecuniary rights, as well where the Government is a party as where the litigation is solely between private individuals. When propositions of compromise of such disputes are made to the Government and accepted by it, the Courts will apply the same rules for ascertaining their meaning as govern in construing like contracts between man and man."

As we have seen, the correctness of this rule as applied to lands claimed to have been acquired from a State or municipal body by fraud is distinctly recognized in the case in 119th Louisiana above cited.

Not only may a municipal corporation compromise fraud by its intentional agreement, but the law goes so far as to hold that such a body may, by its acts, involuntarily waive a fraud and thereby prevent itself from recovering therefor.

The case of BAIRD vs. MAYOR, ETC., OF THE CITY OF NEW YORK, 96 N. Y., 567, illustrates the above. It was an action arising after the exposure of the Tweed ring. Suit was brought against the City to recover the purchase price of ten thousand water meters delivered it at the price of $70 each. The defence was that William Tweed, as Commissioner of Public Works, had fraudulently made the purchase for the City. The court held (p. 598) that even if fraud were shown, nevertheless the City, by accepting and retaining the meters, had waived its rights to object thereto.

If a municipal corporation may be held to have waived fraud, *a fortiori*, it must have the right deliberately to compromise it.

X.

THE LAND COMPANY PAID $100,000 AS A CONSIDERATION FOR THE COMPROMISE, AND IN NO EVENT COULD THAT COMPROMISE BE RESCINDED, BECAUSE THE MONEYS SO PAID HAVE NOT BEEN RESTORED.

There is no suggestion by the Attorney General that the State or the Levee Board, or anybody else, intends to refund

or will refund the money paid by the Land Company as the consideration of the act of compromise. On the contrary, the moneys have been covered into the State Treasury and passed to the credit of the Tensas-Basin Levee District and applied to the uses of the Levee Board. Not only does the Levee Board express no intent to refund the $100,000 received by it, but it declares its wish to retain the money and to stand upon the compromise into which it entered.

To carry on the suit (if that be allowed) is to rescind the compromise without restoring the consideration. This it would be against conscience for the Levee Board to do, and hence it would not be permitted. If the Levee Board would not be permitted thus to repudiate or rescind the compromise, another will not be allowed to do so in its behalf.

It is a familiar rule that a person who enters into a contract and afterwards seeks to avoid the effect of the contract on any ground that entitles him to rescind it, must first restore what he has received and place the other party in *statu quo*.

Grymes vs. Sanders, 93 U. S., 55, 62;
McLean vs. Clapp, 141 Id., 429;
Ward vs. Sherman, 192 Id., 168, 177;
Cook vs. Fidelity & Deposit Co. (C. C. A.), 167 Fed., 95, 101;
Hill vs. Northern Pacific Railway Co. (C. C. A.), 113 Id., 914, 917-918;
Ackerman vs. McShane, 43 La. An., 507;
Althoff vs. Transit Co., 204 Mo., 166.

It must be borne in mind that this sum of $100,000 was received by the Levee Board pursuant to the last contract entered into between the parties to the suit—viz., the act of compromise. Upon elemental principles complainant cannot procure a decree in its favor until or unless that act of compromise be first set aside. To allow the act of compromise to be set aside and the litigation to proceed, and at the same time permit the Levee Board to retain the $100,000 which it secured only on the express condition that it release all claim to the lands in suit, would be to sanction the perpetration of a fraud.

It is, therefore, perceived that before the complainant, or anyone in its behalf, may prevail in the suit and recover the lands, the right of the complainant to rescind *two* con-

tracts must be shown; *first*, the original contract of sale of November 9, 1898; *second*, the act of compromise of July 11, 1913.

The act of compromise or settlement is a *new* contract, and no right to rescind it is shown. The language of the Court in McLean vs. Clapp, 141 U. S., 429, 432, is applicable:

> "*The settlement was a new contract* between him and Clapp *and the law is clear that he cannot take the benefits of that contract and repudiate its burdens.* * * * Now, if he desired to rescind his contract, his duty was at once to return what he had received and repudiate wholly and forever the transaction. So far from doing this he did exactly the contrary; he retained all the notes and securities received under the settlement and has never yet returned one of them.
>
> "Were this all that appeared in the case, there would be nothing rising to the dignity of a question."

In Ackerman vs. McShane, 43 La. Ann., 507, in order to settle the affairs of a partnership, the plaintiff and defendant entered into a compromise in which plaintiff received $20,000 in cash, in full satisfaction and settlement of the interest of the testator in the partnership. A short time after the compromise was consummated plaintiff brought suit for an additional amount of $9,000, charging that the defendant, a surviving partner, had made untrue statements and had committed frauds in settlement. The plaintiff did not allege that she made a tender of the amount received by her as one of the parties to the compromise, but instead she proposed to supplement the amount received to a sum equal to the alleged value of the property. In the opinion of the Court it is said:

> "The defrauded party, if defrauded, cannot be restored to his original rights in the manner proposed. Good pleading and regularity, which should characterize legal proceedings, require that in suits of this nature the party shall resort to an action in rescission, and that the amount received shall be tendered or deposited. In all such actions the parties seeking relief must first offer to restore his adversary to the situation he was in before the contract.

> "As long as the plaintiff retains the consideration and does not offer to return the amount received, he is estopped."

In HILL vs. NORTHERN PACIFIC RAILWAY CO. (C. C. A.), 113 Fed., 914, 918, a release was executed to a railway company for a claim for personal injuries. Afterwards suit was brought to recover for the injuries, and it was sought to avoid the settlement as obtained by false and fraudulent representations. The Court quoted with approval the following statement of the law:

> " 'But there is another insurmountable obstacle in the complainant's way upon this feature of the case, that is, although she desires to set aside the contract of release, she still retains the consideration and has never offered to return it. Where a party attempts to rescind a contract, the rescission must be complete. He cannot affirm it in part and reject it in part. Common honesty would require him seeking to escape the burdens of the contract to return the benefits which he has received. This is not only a rule of common honesty and fairness, but has been recognized by the Courts from time immemorial.' "

So, also, in COOK vs. FIDELITY & DEPOSIT CO., 167 Fed., 101 (C. C. A.), an attack was made upon a settlement for fraud. It is said by the Court:

> "And even if it should be conceded that in this action at law the plaintiff in error was entitled to show, if he could, that the agreements entered into subsequent to August 15, 1905, were executed by reason of fraud or misrepresentations, still upon the most obvious principles of right he could not avoid them while retaining the money and other property received by him by virtue of their execution."

When this cause was before the Court on demurrer (BOARD OF LEVEE COMMISSIONERS vs. TENSAS-DELTA LAND COMPANY, 204 Fed., 736, 741), it was held that, inasmuch as the bill of complaint alleged that moneys in excess of the original purchase price had been received by the Land Company from the sales of lands, it was not necessary for complainant

in its bill to tender to defendant Land Company the $130,000 originally paid for the lands, because the Court could probably adjust the equities between the parties. Clearly the principle there enunciated has no application here. The sum of $100,000 to which we now advert was not received by the Levee Board under the contract of sale made in November, 1898, but was paid to secure the compromise of disputed claims.

There was a *bona fide* dispute between the parties respecting the claims made by the Levee Board in its bill. The Land Company insisted that those claims were wholly false. These disputed claims of the respective parties were made the subject of compromise. It is well settled, as said in FIRE INSURANCE ASSOCIATION VS. WICKHAM, 141 U. S., 564, 577, that:

> "If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum in satisfaction of the entire claim."

This compromise of a disputed claim constitutes, as we have seen, "*a new contract*" between the parties. Because of that new contract the Land Company parted with $100,000 in cash. These moneys have never been restored, nor is any offer made to restore the same, and hence "the law is clear," as said by the Supreme Court of the United States in MCLEAN VS. CLAPP, *supra*, that complainant "cannot take the benefits of that contract and repudiate its burdens."

The State of Louisiana created this Levee Board for the express purpose of receiving, administering and disposing of the swamp lands and tax-title lands within the district and applying the proceeds for the benefit of the inhabitants of the district, in manner as provided in the act. The disposition of the lands and likewise the disposition of suits or proceedings respecting the same, are confided by legislative enactment to the discretion of that body. It is a body composed of representative citizens residing in the eight parishes composing the district. They are men of character and standing in their respective communities. Presumably they are familiar with the value of the lands and know the interests of their constituents, and are competent to act in furtherance thereof.

After much deliberation, and in the exercise of their best judgment, the members of this Levee Board have seen fit to compromise a pending litigation respecting these lands, the success or failure of which depends not upon a mere question of law, but upon their ability or inability to establish facts claimed in their bill. The Honorable Attorney General, while not questioning their good faith, denies their legal right to decide matters expressly confided by legislative act to their discretion. He insists, apparently, that under some rule of law, hitherto unheard of, they have no power to do aught but prosecute the litigation to a conclusion, even though it be manifestly to the advantage of the inhabitants of the Levee District to compromise the same.

If these pretensions of the law officer of the State are well founded, the same may be exercised in the case of every municipal corporation or board in the State of Louisiana, and no longer will there be local self-government in that State, and the powers of all those local bodies may no longer be employed according to the best judgment of the members composing the same, but only as the paramount and superintending authority of the Attorney General may determine. There is no warrant in the laws of Louisiana for such claims.

XI.

Conclusion.

(*a*) We again call attention to the fact that the Attorney General does not in any manner attack the compromise made by the Levee Board on July 11th, 1913, except to assert that it was a compromise of a fraud. He does not impugn the good faith, or business judgment, or the conduct of the members of the Levee Board. He was not the Attorney General who brought either the original suit by the State, or the suit by the Levee Board. This was done by his predecessor in office, Hon. Walter Guion. Having inherited it, he evidently regards it as an heirloom.

(*b*) The claim of the Attorney General that Act No. 3 of the extra session of 1910, quoted in full above, took away from the Levee Board—and consequently every political agency or subdivision in the State—all control over cases

involving title to land is without any foundation. The act does not make any such provision. It would be a very broad stretching of that statute to say that it repealed those parts of the special charter of every municipal corporation and Levee Board in the State which give them power to sue and be sued, to hold and dispose of lands, and to exercise their corporate discretion and judgment in all matters within their corporate powers.

The act simply makes the Attorney General, whenever so instructed by the Governor, appear as the counsel for the State and its sub-divisions. It does not make him, as counsel for the State or one of its sub-divisions in a land case, the master of either the State or of its sub-divisions, with power to veto any action the State or its sub-divisions may take looking to an adjustment, settlement or compromise of the litigation.

(c) In the petition for *certiorari* filed by the Attorney General in this Court, as well as in the petition for *mandamus* and *certiorari* filed in the Circuit Court of Appeals, charges of gross fraud are made, and likewise many extravagant statements respecting the value of the lands in controversy. In the petition for *certiorari*, for example, (par. VI), it is charged that the Tensas-Delta Land Company, Limited, was willing to pay $200,000 for the lands in 1898, yet acquired the same for $130,000; and it is further asserted as a fact that the sum of $20,000 in cash and $18,750 of the capital stock of the Land Company were illegally used by it in consummating the sale.

Again it is asserted in the petition for intervention and appeal, that the lands at the time of the filing of the bill were worth at least $4,300,000 (R. 6), while in the brief (p. 46), filed by the Attorney General in this Court, it is said that they are worth perhaps $7,500,000. In the bill of complaint it is averred, however, that the lands, when conveyed by the Levee Board to the Land Company, were worth at least $500,000 (R. 118), and at the time of the filing of the bill were worth $1,728,439.80 (R. 123).

These statements are unfounded and recklessly made, as well as inconsistent with each other. There is no showing made of any fraud in the purchase of these lands in November, 1898, unless mere unsupported assertion can be said to constitute such showing. Nor are the lands themselves worth more than a fraction of the fabulous sums which

counsel allege them to be worth. In his return the District Judge says (R. 36):

> "The answer filed by the defendant in support of its demurrer and verified by the Hon. F. G. Hudson, legal agent of the defendant, tends to show that the valuations placed on said lands in the bill of complaint are greatly exaggerated. The answer so verified by Mr. Hudson not only denies all fraud in the sale, but states that the lands were worth at the time only $130,000. No evidence was produced before me upon the return of the order to show cause, or at any other time, tending to show that the present value of said lands is so great as stated in the petition for leave to intervene and appeal subsequently filed, or in the petition for *mandamus* and *certiorari* filed in this court. I refer to the answer in support of the demurrer filed by the defendant and verified by Mr. Hudson, not with any thought that it is possible to try upon this motion the truth or falsity of the charges made in the bill of complaint, but because throughout the petition for *mandamus* and *certiorari* filed in this court it is assumed that there was fraud in the sale and that the Levee Board has failed in its duty to prosecute a suit to recover the lands, and that the intervention of the State is permissible for that reason. But no evidence supporting or tending to support these claims or assumptions was at any time introduced before me; nor are the same just inferences from the facts which were shown before me. It does not appear, from anything shown in the court below, that the compromise was in any respect against the best interests of the Levee District, nor that the Levee Board was wrong in its conclusion that the act of compromise, carrying with it the payment of $100,000, was fitly to be preferred to the hope of gaining, balanced by the fear of losing in said litigation."

The District Judge, in his return (R. 37), also adverts to the fact that on a former occasion, viz., on July 9, 1903—an act of compromise with reference to the lands mentioned in the bill of complaint was entered into by the Levee Board, with the Tensas-Delta Land Company, Limited, and that such former act of compromise was, by the act of compromise

of date July 11, 1913, ratified and confirmed. The District Judge further says (R. 37):

> "Under all the facts appearing in the record it might well be deemed by the members of said Levee Board to be a prudent act in the interest of their constituents, to enter into the compromise aforesaid, and thereby acquire for the Levee District the benefits thereof, and *it has at no time been claimed before me by the Honorable Attorney General, or by anybody else, that said members of the Levee Board acted otherwise than in the utmost good faith in the compromise so made by them.*"

In the return of the District Judge it is shown that no State official, or other person claiming to act in behalf of the State, save the Attorney General, objected to the dismissal of the Suit; that it was the view of the District Judge that the Board of Levee Commissioners, acting in good faith and for what it deemed the best interests of the tax payers and inhabitants of the Levee District, was entitled to compromise the litigation and had full power and authority so to do; and hence the District Judge made the order of October 21, 1913, dismissing the suit, and subsequently denied the application of the Attorney General made on April 6, 1914, for leave to intervene and appeal.

It is respectfully submitted that there was no error in the orders so made by the District Judge, nor in the refusal of the Circuit Court of Appeals to issue a peremptory order of *mandamus* to overturn the same.

HENRY BERNSTEIN,
WILLARD F. KEENEY,
Counsel for Respondent.

Powers-Tyson

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JAMES D. MAHER
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No. 6[redacted]264

No. ——.

Supreme Court of the United States

OCTOBER TERM, 1915.

STATE OF LOUISIANA,

Petitioner,

versus

TENSAS DELTA LAND COMPANY, LIMITED, *ET ALS.*,

Respondents.

R. G. PLEASANT,
Attorney-General of Louisiana,
For Petitioner, The State of Louisiana.

G. A. GONDRAN,
DANIEL WENDLING,
Of Counsel.

HAUSER PRINTING CO., "The Legal Printers," 720 Poydras St., N. O., La.

No. ——.

Supreme Court of the United States

OCTOBER TERM, 1915.

STATE OF LOUISIANA,

Petitioner,

versus

TENSAS DELTA LAND COMPANY, LIMITED, *ET ALS.*,

Respondents.

To the Honorable the Supreme Court of the United States:

The petition of the State of Louisiana, appearing herein by and through its Attorney General, Ruffin G. Pleasant, respectfully represents:

I.

That this is an application praying that a writ of *certiorari* may be issued by this Honorable Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding it to send up to this Court for review the record and all of the proceedings had in said court in a certain cause pending before it, entitled, in said court, "*United States of America ex rel. State of Louisiana, Petitioner, vs. Hon. Aleck Boarman, Judge United States District Court for the Western District of Louisiana,*" No. 2636 of its docket, which was

an application made to said court for writs of *certiorari* and mandamus, to be directed to the respondent Judge of said District Court. Said application prayed that, after a review by said Court of Appeals of the record and proceedings and final judgment rendered by said District Court in a certain suit therein pending, entitled "*Board of Levee Commissioners of the Tensas Basin Levee District vs. Tensas Delta Land Company, Limited,*" No. 694 of its docket, and which granted the motion of the defendant, Tensas Delta Land Company, Limited, to dismiss said suit because of an asserted compromise, and refused to permit petitioner to appeal from said judgment to said Court of Appeals, petitioner be held to be entitled to appeal from said judgment, and said Court of Appeals order said District Court to grant an appeal to petitioner in a case in which petitioner's interest in said land is alleged to exceed one million dollars.

II.

The complainant Levee Board alleged, in the said Suit No. 694 of the docket of the District Court, that certain of its members and other persons had made a fraudulent sale of 885,043 acres of land for $130,000, and set out minutely and in detail the character of the fraud, the parties who were bribed in making the same to its great injury, and prayed for judgment setting aside the sale; nevertheless, the Tensas Delta Land Company, defendant, which is charged with participating in said fraud, after paying over $100,000 to said Levee Board, in compromise of said litigation, moved to dismiss the plaintiff's bill, on the ground that the matters therein—which was a fraudulent sale of land—had been compromised. A return or protest was made by the Attorney General (see return, page 44, answer of Respondent

Judge, or Exhibit "B," page 35 of Petition for *Certiorari* to Court of Appeals), on the ground that fraud could not be made the subject of compromise; but, notwithstanding said return, the said United States District Court overruled the same, ratified the said compromise, and dismissed the suit of the Levee Board. (See page 87, answer of Respondent Judge.) Thereupon the State of Louisiana asked leave to intervene in order to prosecute an appeal from the said final judgment, and attempted to file a motion for appeal and assignment of errors, which motion and assignment of errors the said District Court declined to permit petitioner to file, holding that the State of Louisiana had no interest in the subject-matter, and no right to appeal from said judgment of dismissal aforesaid. The motion and assignment or errors do not appear of record in the return of the Judge nor elsewhere, for the reason that the trial Judge refused to permit their filing, but the evidence, showing the Court's refusal to permit same to be filed, will be found in paragraphs IX and X of the return of the respondent Judge. The said petition and assignment of errors will be found annexed to petitioner's application to the Court of Appeals for *certiorari* and mandamus, on pages 7 and 13, respectively, being Exhibits A and B of said petition.

It was then that petitioner, feeling aggrieved, and believing the judgment erroneous, applied for writs of *certiorari* and mandamus to the Court of Appeals. Whereupon the Court entered the following final judgment in said cause:

> "The application for mandamus and *certiorari* to the Judge of the Western District of Louisiana to allow an appeal on the part, and in behalf, of the

State of Louisiana from a case, entitled *'Board of Levee Commissioners of the Tensas Basin Levee District vs. Tensas Delta Land Company, Limited,'* is denied.

"1. Under the decision of the Supreme Court of the State of Louisiana, reported in *State vs. Tensas Delta Land Co., Ltd.*, 126 La. 59, the Supreme Court of the State, on full consideration, decided that the State was without real or beneficial interest in the lands in controversy, and this decision is controlling in this court.

"2. One who is not a party to a record and judgment is not entitled to an appeal therefrom. (*Bayard vs. Lombard*, 9 How. 530; *Indiana vs. Liverpool & London & Globe Ins. Co.*, 109 U. S. 168; *Ex Parte Cockroft*, 104 U. S. 578; *Ex Parte in the Matter of Leaf Tobacco Board of Trade of the City of New York, Petitioner*, 222 U. S. 578, 581.)

"Rule discharged."

Original filed October 29, 1914.

The litigation to unearth this fraud has been before the courts, both State and Federal, for several years, first in an action brought by the State; and, second, in an action brought by the Levee Board, in an effort to have a hearing on the merits. In each instance, instead of answering to the merits, the Tensas Delta Land Company, Limited, has seen fit to file demurrers in an effort to steer clear of the merits. We think we can justly term this litigation, because of the moral turpitude involved, the vast amount of land in contestation, and the vigor with which the case has been prosecuted and defended, a *"cause celebre."*

III.

In order to understand the issues involved in this application, it will be necessary to recite in detail the facts and circumstances leading up to the appearance of the State and the filing of the suit by the Board of Levee Commissioners of the Tensas Basin Levee District against the Tensas Delta Land Company, which was removed into the United States District Court for the Western District of Louisiana on the petition of the defendant Land Company from the Sixth Judicial District Court, Parish of Ouachita, Louisiana, because of the diversity of citizenship of the parties plaintiff and defendant.

Subsequent to the admission of your petitioner into the Union, it acquired a vast quantity of land by Congressional Grant, commonly known as the "Swamp Land Grant" (Acts of 1849 and 1850). Petitioner also acquired many thousands of acres of land by reason of forfeiture because of the nonpayment of taxes under existing laws, all of which is described in the suit of the Levee Board against the Land Company.

Under Article 214 of the Constitution of 1879, it was provided that the General Assembly may divide the State into levee districts and provide for the appointment or election of levee commissioners, in order to supervise the erection and maintenance of levees, to do which it was authorized to levy a tax not to exceed five mills on the taxable property situated within the alluvial portions of said district subject to overflow, and, accordingly, the Legislature created the "Tensas Basin Levee District," composed of the Parishes of West Carroll, Franklin, Catahoula, Caldwell, Ouachita, Richland and Morehouse, in the State of Louisiana, by Act 59 of the Acts of the General Assembly of Louisiana of

1886, as amended by Act 77 of 1888, Act 103 of 1892, Act 70 of 1894, Act 117 of 1898, Act 20 of 1900, and Act 311 of 1908. Under the law creating said district the Governor appointed one qualified voter from each of the parishes of the State to constitute a Board of Levee Commissioners, styled by the act "Board of Levee Commissioners of the Tensas Basin Levee District." It was constituted and appointed a body politic, with corporate powers and with the right to sue and be sued, in the carrying on of the work for which it was created.

By Act 77 of 1888, amending Act 59 of 1886, creating said levee district, it was provided in Section 2 thereof:

> "That, in order to provide additional means to carry out the purposes of this act, and to furnish resources to enable the said board to assist in developing, establishing and completing, either within or without the State, a system of levee and other works of public improvement, all lands now belonging, or that may hereafter belong, to the State of Louisiana, and embraced within the limits of the Tensas Basin Levee District as herein constituted, shall be, and the same hereby are given, granted, bargained, donated, conveyed and delivered unto said Board of Levee Commissioners of the Tensas Basin Levee District, whether said lands or [are] parts of the lands originally granted by the Congress of the United States to this State, or whether said lands have been, or may hereafter be forfeited to, or bought in by or for, or sold to the State at tax sales for nonpayment of taxes."

Section 2 of said act made it the duty of the Register of the State Land Office and the Auditor of the State, or either of them, upon the request of said Board, or its presi-

dent, to convey to said Board, by proper instruments of conveyance, the lands thereby granted, and the president was directed by the act to "cause said conveyance to be properly recorded," and that, "when said conveyances are so recorded, the title to said lands, with the possession thereof, shall from thenceforth vest absolutely in said Board," etc.

IV.

Subsequent to the adoption of said Act 77 of 1888, which gave said Board, or its president, authority to request a deeding over of the lands of your petitioner, the said Board did from time to time apply for, and in due course obtained from the Register of the Land Office and Auditor, deeds to it of many thousand of acres of said land lying within the parishes comprising said levee district, consisting of lands forfeited to petitioner for nonpayment of taxes, and lands obtained by your petitioner from the United States by Congressional grant, all of which are shown in the suit of *Board of Levee Commissioners of the Tensas Basin Levee District vs. Tensas Delta Land Company, Ltd.*, hereinafter referred to. The lands in question were and are the lands of your petitioner, the State of Louisiana, and not of the Levee Board, which the State had turned over to said Board merely as an agent; and, moreover, it was the intention of the law that, should the Board part with said lands, it would do so for a fair and honest price and in an honest and legitimate manner, in keeping with the trust imposed upon it.

V.

In 1894, after petitioner had transferred all of its swamp land and land forfeited to it for taxes within said

district to the said Levee Board, Joseph W. Simms, of Richland Parish, Louisiana, was appointed by said Levee Board as its land agent, to negotiate a sale of said lands, and was authorized to find a purchaser for said lands at a minimum price of fifty cents (50c) an acre. In 1896, said Simms entered into an agreement with James W. Brown, of Brownsville, Tenn., by which said Brown was to assist him in finding a purchaser for said land and share with him in the commission to be paid by the Levee District.

In September, 1898, a fraudulent and collusive scheme was entered into by and between the said James W. Brown, the said Joseph W. Simms, Land Agent aforesaid; Jas. J. Lacey, S. Wood Beal, Thomas Hume, Ransome C. Luce, T. Stewart White, Thomas Friant, Jno. C. Rugee, Jos. J. Tucker and Anton G. Hodenpyl, with certain of the then members of the said Levee Board and certain officers, agents and employees thereof, whereby all of the aforesaid lands were to be sold and delivered for a nominal consideration and at a price far less than their actual value to a company or corporation to be thereafter organized, to be composed of the persons just above mentioned, except James W. Brown and Joseph W. Simms; and, in furtherance of said collusive and fraudulent scheme, and to effectuate the same, a limited liability partnership was formed under the laws of Michigan, domiciled in Grand Rapids; James D. Lacey and S. Wood Beal were placed in active charge of the affairs of said concern, which was styled, in the articles of association, "The Tensas Delta Land Company, Limited," respondent herein.

VI.

The Tensas Delta Land Company, Limited, was willing to pay two hundred thousand dollars ($200,000) for said

land, although worth at the time much more, but the said Land Company actually purchased the same for one hundred and thirty thousand dollars ($130,000) through gross fraud on the part of said Land Company and certain members of the Levee Board and agents, as fully set out in the suit of said Levee Board, which fraudulent scheme consisted principally in the fact that the sum of twenty thousand dollars ($20,000) in cash, and eighteen thousand seven hundred and vfty dollars ($18,750) of the capital stock of the said Land Company were illegally used by it in the consummation of said sale by being given by it to certain of the members, officers and agents of said Levee Board to influence, and which did actually influence, a sufficient number of the said members of said Board of Commissioners, who received the same, to vote in favor of the acceptance of said sum of $130,000 for said land, which said sale was thereafter made on November 9, 1898, in the carrying out and final consummation of said fraud and fraudulent scheme. The details are given in the suit brought by the Levee Board against the Land Company, as also the amounts of money paid to individuals to consummate same. (See Petition, Record, Court of Appeals, in suit of Levee Board vs. said Land Co., annexed hereto, marked Exhibit "Record 1.")

VII.

Petitioner only acquired knowledge of said fraud at about the close of the year 1908, the fraud having been concealed, and within a reasonable time thereafter filed suit in the Seventh Judicial District Court, Parish of Richland, La., against said Land Company to recover the lands, the report of which suit will be found in 126 Louisiana, 59, and is entitled "*State of Louisiana vs. Tensas Delta Land Co.*,

Ltd. The petition in said suit sets forth that certain of the Levee Board members and agents and members of said Land Company had entered into a fraudulent conspiracy with regard to the sale of said lands, and had actually consummated the same through said means, and detailed minutely the fraud and prayed that the sales made be set aside and declared a nullity, and that the State be decreed owner thereof, except as to lands sold to third persons.

The lower Court sustained the exception of the Land Company, holding that the State of Louisiana had no interest in the subject-matter of the suit, and that the Levee Board alone would bring the suit, and dismissed petitioner's suit. This decision was affirmed by the Supreme Court of Louisiana in the above report, the Supreme Court, however, further holding as follows:

> "Again, it is true that if the governing body of one of these corporations fails in its duty to bring a suit which clearly it ought to bring, the Courts may [only, however, under highly exceptional circumstances] allow any citizen or taxpayer of the district to bring the suit; and, in such a case, **the same privilege might for the same reason be extended to the State;** but nothing of that kind is pretended in this case. There is no suggestion that the Board of Commissioners of the District has failed to bring suit, or is unwilling to do so. In fact, this Court knows the contrary from the public prints.
>
> "Moreover, the prayer of a suit of that kind would have to be that the property be returned to the Levee Board to be disposed of as directed by the Legislature; whereas, the prayer of the present suit is, distinctly, that the property be decreed to belong to the State, and be delivered to the State. * * * The effect of granting this prayer would be to take

away these lands from their legitimate custodian and owner, **the corporation to which the Legislature has given them, and under whose control the Legislature has provided they shall be,** thereby frustrating and nullifying an admittedly valid statute. In fact, repealing the statute."

VIII.

Thereafter the General Assembly of Louisiana passed Act No. 3, at its extra session of 1910, making it the duty of the Attorney General to represent the State or any political agency or subdivision in any suit involving title to land or real property belonging to the State or any political agency when requested by the Governor, and, request having been made by the Governor to file suit for the recovery of the said lands, the Attorney General, on October 7, 1911, filed another suit against the said Tensas Delta Land Company, Limited, in accordance with the ruling of the Supreme Court of Louisiana, this time in the name of the said Levee Board. This suit was entitled "*Board of Levee Commissioners of the Tensas Basin Levee District vs. Tensas Delta Land Company, Limited,*" No. 7612 of the docket of the Sixth Judicial District Court for the Parish of Ouachita, in which all of the averments of fraud made and set forth in the petition filed by the State were made in said suit and prayer made for the setting aside of the sale. In due course, because of a diversity of citizenship, said suit was removed by the defendant land company to the District (then Circuit) Court of the United States for the Western District of Louisiana. Demurrers were promptly filed by defendant.

A certified copy of said record is annexed for reference, same being necessary in order that the issues may be proper-

ly presented, the said record being marked, for identification, "Exhibit Record I."

At the argument on the demurrers complainant Levee Board asked leave to amend the complaint as recast, and the Court asked the Attorney General, as counsel for the Levee Board, to prepare and submit the amendment he proposed to file, which was done, and upon being submitted, the Court held that:

> "To allow the proffered amendment would not better the case."

The demurrer was sustained.

The Board of Levee Commissioners appealed said cause to the United States Circuit Court of Appeals, Fifth Circuit, which reversed said judgment and remanded the cause,

> "with directions to allow the amendment offered, to overrule the demurrers, and to allow the defendants twenty days in which to answer, and to proceed with the case according to law and the rules in equity."
>
> See 204 Fed. 741, or pages 8-24 of Answer of Respondent Judge.

In due course, the mandate of the United States Circuit Court of Appeals was filed in the lower court, and an order entered in said lower court overruling the demurrer, ordering that the said proffered amendment be filed as a part of said Levee Board's bill of complaint, and that defendant file its answer.

IX.

After obtaining this order, the Attorney General of the State was actively engaged in getting evidence and prepar-

ing for the trial of the said case on its merits, when, on July 22, 1913, the Tensas Delta Land Company, Limited, defendant in said suit, filed a motion to dismiss, setting forth that by resolution of said Levee Board duly adopted on the 11th day of July, 1913, and confirmed by notarial act, the parties to said cause had "compromised the same and all the issues involved," and that the defendant, the Tensas Delta Land Company, Limited, "in execution of said compromise, has paid to the complainant (Levee Board) the sum of one hun dred thousand dollars ($100,000)." It was ordered by the Court that the plaintiff (Levee Board) "and R. G. Pleasant, Attorney General, its counsel of record herein, do show cause on the first day of the next term of this Court * * * why this cause should not be dismissed at complainant's cost." (See page 33, Return of Judge.)

In answer to the rule to show cause, the Attorney General filed the following protest, insisting that the said agreement should not be recognized nor the said suit of the Levee Board dismissed. (See Return of Judge, page 44.)

> "FIRST. That the said suit is based upon the fraudulent sale of nearly 900,000 acres of land belonging to the complainant and the said fraud vitiates the contract of sale.
>
> "SECOND. A fraudulent sale of public lands cannot be ratified and approved by a subsequent agreement between the vendor and the vendee. Only a new legal and honorable sale, for an adequate consideration, can operate a transfer of said property. The ratification of a fraud is no more legally binding than the perpetration of the original fraud itself, and no government, governmental agency or subdivision, or court, can justify the one nor condone the other. This results not only from the positive expressions

of the law, not only because it is *contra bonos mores* and against public policy, but also because it is inherently one of the fundamental objects of government to prevent and punish fraud, and especially fraud against the sovereign. Government and fraud are basically antagonistic. Either fraud must be condemned and government upheld or fraud upheld and government abandoned.

"The motion to dismiss this suit states that the differences between the parties thereto have been settled and compromised by the payment of $100,000 by defendant to complainant. The only point in dispute was the question of fraud, all others having been abandoned during the progress of the case, as shown in the judgment of this Honorable Circuit Court of Appeals and by admission of complianant's counsel in open court. The question compromised, therefore, was that of fraud, and nothing else, and the Court should not favor wrong instead of right by dismissing a suit of which it has full and complete jurisdiction.

"THIRD. Complainant should not be permitted to use the court and its processes for the purpose of condoning and compromising fraud for money.

"FOURTH. The Attorney general cannot dismiss this suit without express authority from the Governor of the State of Louisiana so to do, for the reason that his right to represent complainant herein and prosecute this suit was conferred upon him by the Governor under the provisions of Act No. 3 of the Extra Session of the General Assembly for the year 1910, and said right has never been withdrawn; that the Attorney General is not answerable to the complainant for his management of this suit; nor is he bound to dismiss same at the request of said complainant; that the effect of said act of the Legislature is to place the Governor in supreme charge of this and similar suits in the event he chooses to proceed

under the act in any particular suit; that the Attorney General is directly responsible to him, and to him alone; that it was the intention of the Legislature, in passing the statute above cited, to give to the Governor, and through him to the Attorney General, the control of suits of this character, and on account of this control prevent the compromise of the public's rights and interests, such as the Board of Commissioners of the Tensas Basin Levee District has attempted to do in the present instance; that the complainant cannot compromise this suit, nor the Court dismiss it, without the Governor's consent in any event.

"*Wherefore,* respondent prays that defendant's motion to dismiss be denied, that the agreement upon which it is based be disregarded, that defendant be ordered to file its answer to the complainant immediately, and that the trial of this case on the merits be proceeded with without delay.

"Further prays for all necessary orders and general and equitable relief.

"R. G. PLEASANT,

"*Attorney General, State of Louisiana, and Attorney of Record for Complainant.*"

X.

Notwithstanding the filing of said return and protest the said District Court, on October 21, 1913, recognized the same "as having the effect of the thing adjudged, and as settling all issues involved," and dismissed the said suit filed by the Levee Board, thus, in effect, permitting the compromise of a fraud for a money consideration, as the entire complaint of the Levee Board contained charges of fraud, which compromise is reprobated by law, and especially by courts of equity, is against public policy and should not have been

sanctioned by the Court, especially since the lands in question were the lands of your petitioner.

XI.

Thus, as petitioner has filed suit previously to recover said land, which was dismissed because of the Court's holding that petitioner could not proceed unless the Levee Board were unwilling to do so, and as the Levee Board had likewise filed suit to recover these lands, but was unwilling to prosecute the same to judgment, your petitioner, the State of Louisiana, as owner of the lands, felt that it was its bounden duty to intervene for the purpose of prosecuting an appeal from said judgment, just as the Supreme Court of the State of Louisiana in the 126th Annual case, above quoted, showed that it had a right to do. This the District Court declined to permit; hence, a resort was had to the said Court of Appeals for a writ of mandamus to compel said Court to permit petitioner so to do, and which petition was dismissed, as hereinbefore set out.

XII.

Petitioner alleges that it is provided by Article 58 of the Constitution of the State of Louisiana of 1898, and repeated by the Constitution of 1913, that:

> "The funds, credits, property or things of value of the State, or any political corporation thereof shall not be loaned, pledged, or granted to, or for, any person or persons, association or corporation, public or private."

That the same provision is contained in the Constitution of 1879, and that it must undoubtedly appear very evi-

dent to your Honors, in view of said provision, that the State of Louisiana has not irrevocably dispossessed itself, by the grants hereinbefore detailed, of all beneficial interest in these lands, but that the intention of the Legislature in making the grants aforesaid was merely to constitute the said Board an agent of the State for the better handling of the affairs of the sovereign, the Levee Board merely acting, as was held by the United States Circuit Court of Appeals on a branch of this case, reported in 204 Federal, 745, "in a fiduciary capacity," and "suing for the benefit of the public before the rights of third praties have attached," and under which state of affairs the Court held it "should be reluctant to deprive it of relief."

Petitioner alleges, therefore, that its interest in and to these lands is paramount, and that while it is true the suit was brought by the Levee Board, yet the fact that its interest therein was paramount entitled the State, as a quasi party, as held in *Williams vs. Morgan,* 111 U. S. 684, to appeal this case. Your Honors held, as late as *Little vs. Williams,* 231 U. S. 335, that a Levee District, similar to the one involved herein,

> "was a mere political subdivision of the State, created by the latter, and invested with authority to construct and maintain levees to protect lands within its limits from overflow by the waters of the Mississippi River, and to levy and collect taxes and take other measures to that end. (Laws Arkansas, 1893, pp. 24, 119.) It was essentially a subordinate agency of the State, was exercising a power of the State for its convenience, could have no will contrary to the will of the State, held its property and revenues for public purposes, and was in all respects subject to the State's paramount authority."

If the Levee Board is subject to the State's paramount control, so are the lands standing in its name, and the State's

right of appeal from said compromise should be recognized in this case, the position of the Levee Board being that of a *quasi* party, as recognized by this Court in *Williams vs. Morgan, supra,* where the Court used this language, in a case where Williams took an appeal from the judgment of court awarding compensation to the trustees under the mortgage, he being the holder of railroad bonds secured by mortgage:

> "We think that the position of Williams and Thompson made them *quasi* parties in the case, and brought them within the reason of the former cases decided by this court in which persons incidentally interested in some branch of a cause have been allowed to intervene for the purpose of protecting their interest, and even to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the Court below."

Petitioner also relies upon the provisions of the Code of Practice of Louisiana, Article 571, in support of its right to an appeal, which gives such a right "not only to those who were parties to the cause in which a judgment has been rendered against them, but also to third persons" aggrieved by the judgment, and which statute, being one that creates a new right or remedy, should have been enforced by said Court sitting in equity.

Petitioner avers that jurisdiction of said cause in the District Court was taken because of diversity of citizenship of the parties plaintiff and defendant; that the judgment of the Court of Appeals refusing the relief prayed for by petitioner is final and unappealable, and that the judgment can only be reviewed by *certiorari* from this Honorable Court to the said Court of Appeals, and that the case presented warrants the issuance thereof.

Petitioner alleges that it is aggrieved by the said judgment of the United States Circuit Court of Appeals for the

Fifth Circuit and the judgment of the United States District Court for the Western District of Louisiana, and believes the said judgments to be erroneous. Petitioner believes and alleges that this Court should require said case to be certified to it for review and for petitioner's relief.

Petitioner further alleges that its interest in this matter exceeds one million dollars.

Petitioner annexes hereto, in accordance with the rules of this Honorable Court, a certified copy of the record and all proceedings had in the United States Circuit Court of Appeals, Fifth Circuit, on the application for certiorari and mandamus, by petitioner, and annexes hereto copies of the record, duly filed in said Court of Appeals, of the cause entitled "*Board of Levee Commissioners of the Tensas Basin Levee District vs. Tensas Delta Land Comapny,*" which is necessary to bring up as an exhibit hereto, being marked "Exhibit Record 1," in order that this Court may be fully advised in the premises, and also annexes a brief in support of said petition.

Petitioner avers that it has notified the Board of Levee Commissioners of the Tensas Basin Levee District, the Tensas Delta Land Company, Limited, and the United States Circuit Court of Appeals, Fifth Circuit, at their proper addresses, and Messrs. Farrar, Jonas, Goldsborough & Goldberg, of New Orleans, La. and Henry Bernstein, of Monroe, La., counsel of record of said Tensas Delta Land Company, respondent in this application by registered letters, through the United States mail, the said letters having been dated and mailed to each of them on September 18th, 1915, addressed to each at his proper address, and bearing proper notice, that petitioner would apply to this Honorable Court on Monday, October 11, 1915, for a writ of *certiorari* to review the judgment herein complained of, as herein shown.

Petitioner alleges that, at the same time, it mailed to said counsel and Court and other parties above named, copies of this petition and of the brief filed in support hereof within the time prescribed by the rules of this Court.

Wherefore, petitioner prays leave of this Honorable Court to file this petition, brief and exhibits, and prays that this Honorable Court, after due consideration thereof, may issue a writ of *certiorari*, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to send up to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings of the said Circuit Court of Appeals in the said cause, entitled *"United States of America ex rel. State of Louisiana vs. Hon. Aleck Boarman, Judge United States District Court, Western District of Louisiana,"* No. 2636 of its docket, the same being a petition for writs of mandamus and *certiorari* as also certified copy of the record and proceedings on a branch of this case bearing the No. 2446 of the docket of said Court, being the suit of the Levee Board against said Land Company, to the end that the said case may be reviewed by this Honorable Court, as provided by Sections 240 and 262 of the Judicial Code, and the Act of Congress, approved January 28, 1915, amending said Code; that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit in the said case be reversed, and judgment entered holding that the State of Louisiana was entitled to prosecute an appeal from the said judgment of the District Court sustaining the compromise entered into by the Board of Commissioners of the Tensas Basin Levee District and the Tensas Delta Land Company; and, to the end that your petitioner may have the proper relief herein,

it prays that the United States Circuit Court of Appeals for the Fifth Circuit be directed to order the United States District Court for the Western District of Louisiana to allow petitioner an appeal from its said judgment upon filing the said assignment of errors and motion for appeal heretofore tendered to said District Court, or that the case be remitted to the said District Court, with directions to allow petitioner an appeal.

And petitioner prays for such further and other orders in the premises as the nature of the case may require and as may be meet and proper in equity, in conformity with the law and procedure of United States Courts.

RUFFIN G. PLEASANT,
Attorney General of the State of Louisiana,
Counsel for Petitioner, the State of Louisiana.

G. A. GONDRAN,
DANIEL WENDLING,
Of Counsel.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

I, Ruffin G. Pleasant, being duly sworn, say:

That I am Attorney General of Louisiana, and, as such, counsel for petitioner State of Louisiana; that I have read the foregoing petition and that the allegations thereof are true and correct, as I verily believe.

RUFFIN G. PLEASANT,

Sworn to and subscribed before me
this 18th day of September, 1915,
at New Orleans, Louisiana.

.....
Clerk Court of Appeals,
Parish of Orleans.

MOTION FOR CERTIORARI.

Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

versus

TENSAS DELTA LAND COMPANY, LIMITED,

Respondent.

The State of Louisiana, petitioner, appears by Ruffin G. Pleasant, Attorney General, and Daniel Wendling, of counsel and moves the Court for the issue of a writ of *certiorari* or other process directed to the United States Circuit Court of Appeals for the Fifth Circuit requiring said Court to certify to this Court for its review and determination a certain cause lately pending in said Court of Appeals, wherein the State of Louisiana was petitioner, and the Hon. Aleck Boarman, Judge of the United States District Court for the Western District of Louisiana, was respondent; and, to that end, it tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Court of Appeals, as also a certified copy of the record on another branch of said case, entitled *"Board of Levee Commissioners*

of the Tensas Basin Levee District vs. Tensas Delta Land Company, Limited," which is necessary in order that this Court may have a clear understanding of the issues involved herein.

Briefly stated, petitioner claims that the District Court of the United States and the United States Circuit Court of Appeals erred in refusing to allow petitioner, the State of Louisiana, the right to prosecute an appeal from the judgment of the United States District Court for the Western District of Louisiana, which said judgment, in effect, ratified a fraud by granting the prayer of the Land Company to dismiss the said suit of the *Levee Board vs. said Land Company*, because of a payment of one hundred thousand dollars made by said Land Company to the Levee Board to put an end to the suit brought by the said Land Company against the Levee Board, which charged fraud in the sale of lands, after which payment the Land Company moved to dismiss the said suit and to ratify said compromise. To this the Attorney General filed a return that fraud could not be made the subject of a compromise, which objection was overruled, and the motion to dismiss granted. Thereupon, the State, claiming to be the owner of the lands involved in said suit, which it deeded over to the Levee Board merely as an agent, moved to be permitted to appeal from said judgment, as a matter of right and as a *quasi* party to the record. The District Court having refused to permit the filing of a petition for appeal, and the State having applied for relief to the United States Circuit Court of Appeals, which likewise denied the relief prayed for, the State now comes before this Court praying for a *certiorari*, on the unique facts presented in the petition herein.

The State contends that, in view of the showing made, it should be allowed an appeal from the judgment of the District Court for the Western District of Louisiana, the effect of which judgment was to take away, through fraud, lands of the State worth several million dollars.

RUFFIN G. PLEASANT,
Attorney General.

G. A. GONDRAN,
DANIEL WENDLING,
Of Counsel.

No. ——.

Supreme Court of the United States

OCTOBER TERM, 1915.

STATE OF LOUISIANA,

Petitioner,

versus

TENSAS DELTA LAND COMPANY, LIMITED,

Respondent.

BRIEF OF PETITIONER.

May It Please the Court:

The question of law presented by the record is this: Was the State, in view of the fact that the Levee Board discontinued and compromised its suit against the Tensas Land Company, in the United States District Court, entitled to prosecute an appeal from the said judgment, as provided by the Code of Practice of Louisiana, Article 571, on the ground, as averred in its petition for appeal, that it was aggrieved and injured by the said judgment, and because of its being a *quasi* party to the record?

This case was commenced in the Sixth Judicial District Court of Louisiana, and was removed by the Land Company to the United States District Court for the Western District of Louisiana. Had the case remained in the State court, we think the right of the State to appeal therefrom would have been absolutely beyond question, on the showing made by its petition for appeal, as the Code of Practice of Louisiana, Article 571, provides:

> "The right of appeal is given, not only to those who were parties to the cause in which a judgment has been rendered against them, but also to third persons, not parties to such suit, when such third persons allege that they have been aggrieved by the judgment."

And the points presented are as follows:

1. Was the State injured and aggrieved by the judgment of the District Court ratifying said contract

2. If so, can that statute be taken advantage of by the State of Louisiana in a United States court If not, is the State not entitled to appeal as a quasi party of record?

Our contention is that the District Court should have granted an appeal; that the United States courts have jurisdiction to enforce this new right or new remedy provided by said provision of the Code of Practice, or at any rate that the State was entitled to appeal as a quasi-party. We think the following authorities show this:

National Surety Co. vs. Bank, 120 Fed. 593, holding that:

> "The Federal Court sitting in equity has jurisdiction in an appropriate case to enforce the new right and administer the new remedy created by these provisions of the Code of Nebraska. Rights created

and remedies provided by the statutes of the States, to be pursued in the State courts, may be enforced and administered in the national courts, either at law, in equity, or in admiralty, as the nature of the rights or remedies may require." (Citing many cases.)

To the same effect is Foster's Federal Practice (4th Ed.), par. 7, page 15, where the author says:

"SEC. 7. STATE LAWS CREATING NEW RIGHTS ARE ENFORCED BY FEDERAL COURTS AT LAW OR EQUITY. If, however, the customary or statute law of a State has created a new right, the Federal courts will enforce the same at law or equity, if it falls within the remedies authorized by either branch of their jurisdiction.

"Such are statutes * * * authorizing a suit to set aside the probate of a will, or a will itself *for fraud* (*Broderick's Will*, 21 Wall. 503, and other cases), even though the statute provides that the suit shall be brought in a specified State court. * * * A Federal court will follow a State statute (page 17) 'authorizing an injunction to be granted in a new class of cases.' (*Cummings vs. National Bank*, 101 U. S. 153, 157, and other cases.) 'Federal courts of equity have followed statutes * * * creating and providing for the enforcement of a mechanic's lien. (*Davis vs. James*, 2 Fed. 618.)' That the summary method of foreclosing a mortgage under the Louisiana Code belongs on the equity side of the court (*Fleitas vs. Richardson*, 147 U. S. 538), and that the Louisiana statute authorizing a summary proceeding to set aside an incorrect assessment for taxation will be enforced pursuant to the chancery practice on the equity side of the Court. (*Lindsay vs. First National Bank*, 156 U. S. 485.)"

Same author, page 20:

> "When a State statute creates a new liability and provides that it can only be enforced in a specified tribunal, the Federal courts will enforce the liability, and reject the clause respecting the exclusive jurisdiction. (*Davis vs. James*, 2 Fed. 618.)"

The doctrine announced in the foregoing cases and authorities is in keeping with the principle, so often announced, that while State legislation cannot curtail equitable rights and remedies,

> "it must not be understood that the Federal courts of equity will not enforce new rights and remedies, or new remedies for old rights created by State legislation, after it has acquired jurisdiction."
>
> Simkins Suit in Equity (2nd Ed.), p. 17,

the author stating, on page 18, that it has been frequently declared that

> "A party, by going into the National courts, does not lose any right or appropriate remedy of which he might have availed himself in the State courts in the same locality."

As long ago as 1880, in *Davis vs. James*, 2 Fed. 618, the Court held that the Court would enforce, in an equitable proceeding, rights created by State statute the Court holding:

> "Decisions of the Supreme Court bearing upon the question seem clearly to determine that, even in a case where the right of action is originally derivable wholly from the State statute, which also designates the court in which such remedy may be enforced,"

the Federal courts would follow same.

The Court, further on, says:

> "The question is one involving the right to pursue a remedy. * * * And if, in the case where a right of action, whether it pertain to persons or property, exists only in virtue of, and is solely derivable from, a statute of a State, that statute also declaring that the remedy to enforce such right shall be brought in a court of the State—if, I say, in such a case the remedy may be enforced in a court of the United States, as has been distinctly held, I am unable to perceive why, in a case like that in hand, the remedy may not also be pursued in the Federal court, notwithstanding the State statute."

United States Bank vs. Lyon County, 48 Federal Reporter, 632, was a suit pending on the equity docket, the bill having been filed to recover a decree or judgment against defendant for bonds bought by the bank, issued by defendant, and which defendant refused to pay. Upon demurrer to the bill the Court found that the facts did not show a case for equitable relief, on the ground that complainant had an equitable remedy at law, and sustained the demurrer. Thereupon complainant filed a motion in said cause asking that the cause be transferred from the equity to the law side of the United States Circuit Court, which motion was based upon the provisions of the statute laws of Iowa, and the Court granted the motion, thus enforcing the procedure of the State court of Iowa. In the course of the opinion, the Court says:

> "Why may not this Court follow this statutory enactment as a proper rule of action, when it finds that a case, proper for an action at law, has been commenced in form of a suit in equity? * * * Why put the parties to the delay and expenses neces-

> sarily caused by a dismissal and recommencement of the proceeding, when the same can be saved by following the rule enacted in the State statute, and adopting the same as the proper practice in the Federal court?"

And the Court sustained the motion and ordered the case transferred to the law side of the docket.

In *Cowley vs. Northern Pacific Railroad*, 159 U. S. 569, it is held (syllabus):

> "If a special proceeding under Washington Code, par. 436, to vacate a judgment for fraud, be removed to a Federal court, the petitioner loses no right that he would have had, had it not been removed."

The case shows that, originally, a proceeding was brought by the railroad against Cowley, the appellant, to recover possession of land. The case being at issue was referred to a referee to take testimony, and on the day set for the hearing the land agent of the railroad made an oral offer to appellant's attorney to compromise the case by paying $8,000 cash, the attorneys, by their contract with appellant, to receive one-quarter thereof. The attorneys advised the acceptance of same, but Cowley refused, notwithstanding which refusal the attorneys accepted the compromise. Cowley refused to ratify same, and employed other attorneys, but his original attorneys insisted upon the payment of their fee, and went on and receipted for the $8,000 paid by the compromise, which was turned over by the railroad to a bank.

Thereafter, the appellant instituted suit in the District Court of the Territory, and afterwards proceeded with it in the Superior Court of Spokane, State of Washington,

after admission as a State. It was then removed to the United States Circuit Court, which rendered a decree dismissing the bill. Subsequently it was taken to the United States Supreme Court. The following quotation from the opinion is pertinent to the question involved in this case:

> 'The Court (United States Circuit) declined to consider it as a proceeding under the Code, saying that the rights of the parties and the limitations of their rights, in such a statutory proceeding, were quite different from the rights and limitations and the rules which must govern the decision **in a suit in equity,** and that the effect of a decision of judgment was entirely different."

Answering this conclusion of the lower Court, the Court says:

> "It would appear, however, in view of Section 440 of the Territorial Code, providing that the parties shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, that the pleadings should be governed by the principles, and the issues made up in the form, and all the proceedings conducted, as in an original action by ordinary proceedings—that there was no impropriety in filing this petition or complaint as an original proceeding, or conducting the case in the ordinary method.
>
> " * * * In the case of *Gaines vs. Fuentes,* 92 U. S. 10, which was an action to annul an alleged will, brought under the laws of Louisiana, in the District Court of the Parish of Orleans, and removed to the Circuit Court of the United States, it was held that this suit was, in effect, an action between the parties, and that the Federal Court had jurisdiction. It was said that if the suit could be maintained in a State court, it might also be maintained by original

process in a Federal court, where the requisite diversity of citizenship existed.

* * * * * * * * *

"But while, after the removal of the case to the Circuit Court of the United States, it might properly be docketed and tried by the Court as an equity suit, it still remained, so far as the rights of the plaintiff were concerned, a special proceeding under the Territorial statute; and the powers of the Court in dealing with it were gauged, not merely by its general equity jurisdiction, but by the special authority vested in its own courts by the statutes of the Territory. Had the case never been removed to the Circuit Court, it would have proceeded in the State court as a special proceeding under the Territorial statute, and we are of opinion that, upon its removal to the Circuit Court, petitioner lost no right to which he would have been entitled had the case not been removed.

"Even if it were treated as in form a bill in equity, the right of complainant would be gauged as well by the statute under which the bill was filed as by the general rules of equity jurisprudence. If any action or proceeding in a State court were subject to be defeated or impaired by one of the parties exercising his statutory right to remove it to a Federal court, no one would be safe in instituting such a proceeding in any case wherein, by reason of diversity of citizenship or otherwise, it might be subject to removal. While the Federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains in substance a proceeding under the statute, with the original rights of the parties unchanged.

"Although the statute of a State or Territory may not restrict or limit the equitable jurisdiction of the Federal courts, it may establish new rights or

privileges which the Federal courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side."

The Court then cites several authorities in support of its conclusion, among them *Davis vs. Gray*, 83 U. S.; 16 Wall. 223, 231, to the effect that:

> "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals." Citing other cases.

These authorities show that courts of equity follow State statutes of procedure, and, it seems to us, sustain the right of the State of Louisiana to take an appeal from the judgment of dismissal rendered by the respondent Judge, and, in this respect, we submit that the State should not be concluded by the trial Judge's assertion that he exercised a discretion in the matter. The State statute makes no exception. It gives anyone aggrieved a right to appeal from the judgment; and, as courts of equity grant relief in cases to prevent a multiplicity of suits, on the same principle ought the respondent Judge have granted an appeal, so that the State could appeal directly from the judgment rendered and not be subjected to the delay and expense of instituting a direct action.

As said in *U. S. Bank vs. Lyons*, 48 Fed., *supra*:

> "Why may not this Court follow this statutory enactment as a proper rule of action? * * * Why put the parties to the delay and expense necessarily caused by a dismissal and recommencement of

> the proceeding, when the same can be saved by following the rule enacted in the State statute, and adopting the same as the proper practice in the Federal court?"

And the principle announced in *Cowley vs. Railroad, supra,* that:

> "If any action or proceeding in a State court were subject to be defeated or impaired by one of the parties exercising his statutory right to remove it to a Federal court, no one would be safe in instituting such a proceeding in a case * * * subject to removal."

This is a wise and salutary rule.

The respondent's brief contains authorities to the effect that one who is not a party to the record and judgment may not appeal from a judgment rendered therein. We frankly confess the existence of such authorities in cases presenting wholly different facts than in the instant case, and, while the cases do not show it, we believe the said authorities to be good law in those States, perhaps, where there is an absence of the statutory procedure provided for by the Code of Practice of Louisiana, Article 571, and which article we contend this Court should enforce in the instant case, since it was removed from a State court.

In *West vs. Smith,* 101 U. S. (11 Otto) 263, it was held (syllabus):

> "Where a cause is removed from a State court to the United States Circuit Court, the latter Court may allow such amendments to be made to the declarration as would be allowable by the State practice."

In *U. S. vs. Conway,* 175 U. S. 60, it was held that an appeal may be taken by the United States from a decision by

the Court of private land claims in favor of a petitioner, although the Government had no interest in the result of the litigation.

All these authorities show that the United States courts follow the State practice. In addition to this, it may be remarked that the Levee Board is really a nominal party, since the lands are lands of the State, confided to the care of an instrumentality which is subject to the paramount authority of the State, and the State is, in a legal sense, a *quasi* party, and entitled to appeal. It is idle, it seems to us, to argue that the State has no interest in these lands simply because the State for convenience, has placed them in the name of the Levee Board. The State could abolish this Board at any time, upon the happening of which the lands in controversy would revert to the State. The Levee Board is simply an agent of the State in order to better handle a portion of its sovereignty.

Also the people of the State will be compelled to pay more taxes for the support of the Tensas Levee District if the property in contestation be not recovered. A tax of nearly one mill is levied throughout the entire State in support of the levee districts, although the hill portions of the State have no more need for levees than the hill portions of Alabama or Massachusetts.

In *Norfolk, etc., Turnpike Co. vs. Virginia*, 225 U. S. 264, the motion to dismiss was based on the contention that the Commonwealth of Virginia was not made party to the appeal. The Court sustained the appeal of the turnpike company, saying:

> "Although * * * not named as a party to the proceedings initiated by the Judge of the Circuit Court, it is not claimed that those proceedings were

> not in reality begun and prosecuted on behalf of the Commonwealth, which in effect must have been the conclusion of the Court below."

Of course, in order to appeal, the State must be aggrieved. That the State has been aggrieved by said judgment is, to our minds, too plain for argument. Counsel for respondent differ with us in this view, and they cite the Court to the decision of the Supreme Court of Louisiana in *State vs. Tensas Land Co.*, 126 La. 59, in support of their contention that the State of Louisiana has no interest—that being the suit in which the State sought to set aside the sale of these very lands.

The Court did dismiss the petition of the State in that case, but the reason for the dismissal will be shown, by a careful reading of the opinion, to be based upon the fact that the State, in its petition, prayed that the lands, which stood in the name of the Levee Board on the conveyance records, "be decreed to belong to the State, and be delivered to the State," which the Court held it could not do, because the effect of granting such a prayer would be to take away those lands from their legitimate custodian, the corporation to which the Legislature had given them, and under whose control the Legislature provided they should be, and turn them over to the State by decree of Court, thereby frustrating and nullifying an admittedly valid act. But the Court found that, if the governing body of this corporation failed to bring the suit, the Courts may allow any citizen or taxpayer to bring the suit;

> "and in such a case the same privilege might, for the same reason, be extended to the State. * * * There is no suggestion that the Board of Commissioners of the district * * * is unwilling to do so. In fact, the Court knows the contrary from the public prints."

Thereafter the Levee Board brought suit, but, notwithstanding the charges of fraud, failed to prosecute it. On the contrary, it compromised the charges of fraud for a money consideration; and, notwithstanding the protest of the Attorney General, filed in response to the order to show cause rendered by the respondent Judge, the Court ratified said compromise.

Then it was that the State of Louisiana filed its petition for appeal to the United States Circuit Court of Appeals.

It was not the intention of the Court, in the opinion rendered in *State vs. Tensas Land Co.*, to hold that the State has absolutely no interest in the fraudulent sale of lands made by a levee board, but that it could only have a standing in court where the Levee Board failed in its duty to bring a suit. Now, the Levee Board did bring the suit, but it compromised the same, and the State has attempted to step in, in keeping, as we think, with the ruling of the Supreme Court of Louisiana, in order to prosecute the suit which the Levee Board has failed in its duty to prosecute. That the State has an interest in these lands is further plainly shown by the Constitution.

Article 58 of the Constitution of 1898 provides:

> "The funds, credit, *property* or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private."

The above article also appears in the Constitution of Louisiana for the year 1879. In *Orr vs. New Orleans*, 50 An. 88, the Supreme Court held that this prohibition "removes from the General Assembly the power, through any delegation from it, to confer authority upon parishes or cities in

the State to make them," and that grants based on such delegation would be null and void.

If the argument be that the State has irrevocably divested itself of all interest in these lands, it seems to us the mere reference to this article and construction thereof is sufficient to show the fallacy of this contention, and that the Supreme Court did not mean to hold that the State had no beneficial interest in them, since the State could abolish this Board at any time, but that it was intended to hold that the State could not proceed unless the Levee Board declined to proceed. The Board is merely an agent of the State (122 La. 615), and, as was held by Judge Shelby, as the organ of the court when this case was before the Court of Appeals, the Levee Board is "acting in a fiduciary capacity" and "suing for the benefit of the public before the rights of third parties have attached" (204 Fed. 745), under which state of facts the Court held it "should be reluctant to deprive it of relief." The State contended, and now contends, that the Levee Board's compromise of this case was against public policy, and hence attempted to appeal from the judgment rendered ratifying the compromise, on the ground that it and the public were thereby injured and aggrieved; and we submit that the State had an interest in appealing, and has shown its interest in the petition for appeal filed in the respondent's court, for the interest of the State, the public and the Levee Board go arm in arm; that which is detrimental to a levee board is likewise detrimental to the State and the public, and *vice versa*. In fact, in *Fisher vs. Levee Board*, 39 An. 453, the Supreme Court of Louisiana went so far as to hold that it failed to see how a levee board,

> "created by the State as one of its functionaries, charged with the duty of providing for the general

welfare of the people by protecting them from inundation, could, by any reasoning, be considered as an association or corporation distinct from, and independent of, the State within the intendment of the prohibition contained in Article 56 of the Constitution, when it says: 'The funds, credit, property, or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged, or granted to or for any person or persons association or corporation, public or private.' "

As late as *Little vs. Williams et al.*, 231 U. S. 335, this Court held the State's title, in instances like these, paramount:

"Assuming that the inchoate title had been passed to the Levee District under the act of 1893, was the district in any better situation than the State? The answer turns upon the relation of the one to the other. The district was a mere political subdivision of the State created by the latter and invested with authority to construct and maintain levees to protect lands within its limits from overflow by the waters of the Mississippi River, and to levy and collect taxes and take other measures to that end. (Laws Arkansas, 1893, pp. 24, 119.) It was essentially a subordinate agency of the State, was exercising a power of the State for its convenience, could have no will contrary to the will of the State, held its property and revenues for public purposes, and was in all respects subject to the State's paramount authority. In view of this relation, we are quite clear that the State's action was binding upon the district, and that the latter could not, by its subsequent deed to the plaintiff, invest her with a title which it no longer possessed. In this respect the case is not distinguishable from *Rogers Locomotive Mach. Works vs. American Emigrant Co.*, 164 U. S. 559, 577 (41 L. Ed. 552, 559; 17 Sup. Ct. Rep. 188)."

If the Levee Board is subject to the State's paramount control, so are the lands standing in its name, and the State's right of appeal from said compromise should be recognized in this case, the position of the Levee Board being that of a *quasi* party, as recognized by the Supreme Court of the United States in *Williams vs. Morgan,* 111 U. S. 684.

The right of appeal of the State in this case is similar to that taken in the said case of *Williams vs. Morgan,* in which case Williams took an appeal from a decree in the Circuit Court for the foreclosure of a railroad, fixing the compensation to be paid to the trustees under the mortgage from the funds realized from the sale, in which the Court held that Williams, a holder of railroad bonds, secured by mortgage, under foreclosure, had an interest in the amount of the trustee's compensation which entitled him to intervene and contest it and appeal from an adverse decision. The Court referred to Williams and Thompson, the appellants, as "*quasi* parties." Said the Court:

> "We think that the position of Williams and Thompson made them *quasi* parties in the case, and brought them within the reason of the former cases decided by this Court in which persons incidentally interested in some branch of a cause have been allowed to intervene for the purpose of protecting their interest, and even to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the Court below."

Citing, among other cases: *Sage vs. Railroad,* 96 U. S. 712, where parties interested were allowed to appeal from an order confirming a sale; *Trustees vs. Greenhow,* 105 U. S. 527, where an appeal from an allowance of costs

and expenses, suing on behalf of a trust fund, was sustained; *Hovey vs. McDonald*, 109 U. S. 150, where an appeal was allowed to be brought against a receiver from an order made in his favor.

In *Blossom vs. R. R.*, 1 Wall. 635, it was held that a purchaser or bidder at a master's sale subjected himself *quo ad hoc* to the jurisdiction of the Court, and became so far a party to the suit, by the mere act of making a bid, that he could appeal from any subsequent order of the Court affecting his interest.

If a bidder at a Marshal's sale may appeal, because of his interest in the subject-matter, why may not the State because of its interest in land which it claims an agent has turned over to a company in compromise of a matter alleged to be against public policy and to the injury of itself and the public.

We have not been able to find a similar case in the books. In the first place, the bill charged fraud, which vitiates everything. The Levee Board came into court setting up the fraud practiced by the Land Company, and then compromises the case, without the State's consent. There has not been a decree on the merits passing on the question of fraud *vel non*, the Levee Board having compromised the same before the merits of the case was reached. The Attorney-General protested against the Court ratifying the compromise, and then sought to appeal on behalf of the State from the judgment, on the ground that its agent had ratified a contract against public policy, and to its injury. In such a case, if there be no precedent for an appeal, on account of the importance of the issues and the fact that a fraud is sought to be unearthed, the establishment of a precedent for an appeal in such a case as this would not be without good results, particularly in view of the fact that

the statutes give such a right of procedure in a State court. Courts of equity are constantly establishing new precedents to meet changed conditions, and in such a case as this, where the State is virtually the Levee Board, suing for the interest of the public, the creation of such a precedent, if none should exist, would be a step in the right direction. "This suit does not stand," as said by Judge Shelby on a branch of this very case, "like a suit between private parties. The plaintiff is a public corporation charged with the management and sale of a vast area of real estate," and because of the fact that it was held to be a public corporation the Court made a distinction for that reason (204 Fed. 745), citing *U. S. vs. Minor*, 114 U. S. 230, 240, in support thereof. When we examine this cited case we find, in the said opinion, this significant statement, involving, too, a case of **fraud:**

> "When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of land of which it has been defrauded by this means, should have remedy against *that fraud*—**all the remedy the courts can give**—than in the case of a **private owner** of a *few acres* of land on whom a like fraud has been practiced";

showing that in matters which concern the Government the Courts go the limit to unearth fraud—"all the remedy the courts can give."

On page 31 of the brief for respondent, referring to the State's want of right to take an appeal in the District Court, counsel say:

> "If the State of Louisiana has any rights therein, an independent suit lies in the name of the State to enforce those rights."

And yet, on page 12 of their brief, in striking contrast to this, they say:

> "The State of Louisiana is without legal interest in the subject-matter of this suit, and has no authority in its own name or right to carry on the litigation, and it was so specifically held by the Supreme Court of Louisianan in the cause entitled *State vs. Tensas Delta Land Co., Ltd.*, reported in 126 La. 59."

Thus the State, if the contention of counsel be correct, is placed in the anomalous position of having no remedy for a wrong done to its own property—no remedy by appeal in this proceeding, and none by an independent action should this Court refuse the State the relief prayed for.

Could there be a case presented calling more loudly for the interposition of a court of equity in behalf of the relief prayed for than this?

The contention of counsel that the State must tender the money paid by it in compromise is untenable, and was so declared by this Court when this case was on appeal, the Court observing (204 Fed. 741) that:

> "It was not necessary to make such tender. The bill shows that the defendant has sold part of the land which was conveyed to it by the plaintiff, and the plaintiff is seeking by this suit not only to annul the deeds, * * * but also to recover more than $480,000," etc.
>
> Citing *State of Texas vs. Snyder*, 66 Tex. 687.

There seems, from the very first, to have been a predetermination never to let this case go before the courts on

the merits, as every means possible has been resorted to in order to prevent it.

Perhaps your Honors have not had before you, for many years, from this State, a case which involves property of greater value than that which is the subject of contestation in this suit. It embraces nearly a million acres of land, and is worth, perhaps, seven and one-half million dollars.

But this is not the only thing of value in this case. That which is of far greater importance is the dignity of this Commonwealth, and the honor, manhood and high purposes of her citizenry, and we would impress upon your Honors that, with the exception of a few persons directly interested, the people of the State are unanimous in their vehement expressions of disapproval against this compromise of the public honor.

The State feels, under the peculiar circumstances of this case, that it has a right to appeal from the action of her subordinate agent and from the decision of the Court which ratifies that action and makes it the basis for a judgment, which, unless reversed, will put a subordinate agency of the State on record as being not inimical to a fraud as such, but which is willing for fraud to be committed by its own predecessor, in order that such an illegal action may be used as the basis for obtaining a little hush money from the other party to the said fraud, in defiance of the express terms of the laws of the State, which absolutely provide that, in such cases, the fraud-contract must be set aside, and the property which is the basis thereof must be returned to the Government, or its proper agent.

There is no doubt that the compromise herein complained of is against the public policy of the State of Louisiana.

> Old Civil Code La., Arts. 11, 12, 1885, 1886, 1887 and 1889; *Cummings vs. Saux*, 30 An. 207; *Davis vs. Holbrook*, 1 La. An. 176; *Schmidt vs. Barker*, 17 La. An. 261; *Bernard vs. Auguste*, 1 La. An. 69; *Hardie vs. Scheen*, 110 La. 612.

When seeking to determine the public policy of a State, the principal sources of information are the State Constitutions and Statutes, and the decisions of the Courts, State and Federal; and, in case of a divergence between them, the decisions of the State Courts must be accepted as the best evidence.

> Elliott on Contracts, page 11, paragraph 651, citing *Hartford Co. vs. Chicago, etc., R. Co.*, 62 Fed. 304; *Vidal vs. Girard's Excutors*, 2 How. 127.

Although the question is not before the Court, we append hereto some authorities which show beyond question that the compromise of this case was against public policy.

In *Reeves vs. Butcher*, 31 N. J. L. 224, the Court says:

> "There can be no such thing in law, strictly speaking, as a ratification of a transaction which, at the time of its performance, was prohibited by statute. The parties cannot legalize that which the law has declared illegal."

Comstock vs. Draper, 53 Am. Dec. 80:

> "It is a well-settled doctrine in the English and American books that an illegal transaction cannot constitute a good consideration for a promise. If the connection between the original illegal transaction and the new promise can be traced, if the latter is connected with and grows out of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery, for repeating avoid promise cannot give it validity."

In *Comstock vs. Bower,* 4 Wesson & Welsby's Reports, 361, a petition having been presented to the House of Commons against the return of one Fector, alleging that he had been guilty of bribery and corruption and other illegal practices in the said election, and that the return of the said Fector had been obtained by bribery and other illegal practices, and praying that the said election and return might be declared null and void, which petition was abandoned in consideration of £500 and other stipulations. Payment of same being declined, suit was brought for its recovery.

Lord Abinger, Chief Baron, disposing of the case, says:

> "Here was a petition presented on a charge of bribery. Now this is a proceeding instituted not for the benefit of individuals, but for the public—and the only interest in it which the law recognizes is that of the public. I agree that if the person who prefers that petition finds, in the progress of the inquiry, that he has no chance of success, he is at liberty to abandon it at any time. But I do not agree that he may take money for so doing, as a means and with the effect of depriving the public of the benefit which would result from the investigation. It seems to me

as unlawful to do so as it would be to take money to stop a prosecution for a crime. In either case the prosecutor might say that he is not bound, at his own expesse, to continue an inquiry in which the public alone are interested; but such a reason does not amount to an excuse where he receives money for discontinuing the proceedings. Without saying whether it was unlawful to receive money as a consideration for constraining a future election, it is enough in the present case to determine that a contract for money to abandon a petition for bribery was illegal."

And Parker, B., delivering a separate opinion, said:

"I am of the same opinion. * * * I think that such an agreement is unlawful, because the penalty imposed on a member for bribery is a penalty imposed for the benefit of the public, and the case is the same as that put by Lord Chief Baron, of money taken by an individual to stop a prosecution."

Pierce vs. Kibbee, 51 Vt. 559: In this case a note and mortgage, given in lieu of notes and mortgages given to compound a felony, were held invalid.

In *Simmons vs. Kelsey,* 76 Neb. 124 (107 N. W. 122), the facts show that Mrs. Simmons, the plaintiff, inherited about $25,000 from a brother, about $18,000 of which was ready for distribution and was to be paid over to her on or about January 7, 1903. At about said date, and before Mrs. Simmons had received any portion of the inheritance, one of her daughters instituted proceedings in the County Court for the appointment of a guardian for her, alleging as ground therefor that Mrs. Simmons was not of sufficient mental capacity to have the care and management of her

property. While such proceedings were pending, the plaintiff, Mrs. Simmons, entered into a contract with her husband, children and certain of her grandchildren, issue of deceased daughters, whereby she surrendered all of her estate, save less than $3,000, to such children and grandchildren, and the amount reserved was placed practically beyond her control.

After this contract was signed, the procedings for the appointment of a guardian were dismissed.

In pursuance of the contract just mentioned, about $8,000 of the plaintiff's inheritance was collected and distributed among the children and grandchildren.

Afterwards the plaintiff commenced this suit against the other parties to the contract for a cancellation thereof, alleging that it was made by her without any consideration, and that her consent thereto had been procured by undue means, employed by the defendants, to that end.

The defendants answered, setting up the contract executed as above set out, averring that the contract was founded on a sufficient consideration and a subsequent ratification, etc.

After disposing of some preliminary questions, the Court, coming to the merits, says:

> "Whatever may have been the motive that induced such proceedings, the record leaves no room for doubt that they operated to disturb and harass the plaintiff, and that she was exceedingly anxious to have them dismissed. * * * No consideration moved to the plaintiff, save the dismissal of such proceedings. Obviously that was not a valid consideration, because, if the proceedings were well grounded and brought in good faith, public policy required that they be pushed to a conclusion. If

groundless, and not brought in good faith, public policy would again interpose and require their dismissal, *and that, too, without consideration. In neither case would the party instituting the proceedings be permitted to use them as a source of profit to herself.* The fact that after instituting such proceedings she was one of the parties to undertake to bind the plaintiffs by the contract in suit, involving a large estate, reflects somewhat on the good faith with which the charge of mental incapacity was preferred.

"The finding, then, that the contract was procured by undue means and without consideration, is sufficiently sustained by the evidence and justifies the decree, not only as to such of the defendants as made use of such means to procure the contract, but as to all who seek to profit by it.

"We note that the defendants resisting the suit urge that the contract has been partially performed on their part. Such performance, aside from the dismissal of the proceedings for the appointment of a guardian, which we have already noticed, consists of the appropriation by the defendants of a large portion of the plaintiff's estate. It is hardly necessary to add that such acts of performance do not stand in the way of a cancellation of the contract."

Elliott, in his very recent work on Contracts, paragraph 719, page 69, says:

"Agreements relating to civil procedings and involving and providing for anything inconsistent with the full and impartial course of justice therein, or those that tend to pervert the course of justice or its pure administration by the courts, are illegal." (Citing cases.)

"In case public interests are involved in a civil suit, it **cannot be compromised in derogation to the interests of the public."**

Springfield Fire & M. Ins. Co. vs. Hull, 25 L. R. A. 41, is a case where the plaintiff suffered a total destruction of her premises by fire, but was induced by threats to accept less than the real damage. The Court held she was either entitled to all or to none, from the facts shown, and it came to the conclusion that the contract was void and that the plaintiff was entitled to the whole amount, and that it was not necessary to make a tender. On the question of tender the Court says:

> "Besides the contract being void because resting upon an illegal consideration, its refutation by one party does not give the other a right to have restored to him what he parted with under it; nor does the retaining by the party of what he has received amount to a ratification of the contract by him. Such contracts have no validity from the beginning, are capable of receiving none by any ratification, however deliberately and formally made; for any attempted ratification must necessarily be as ineffectual as the original contract, because as illegal. The law does not recognize the right of the parties to contracts of that nature to either have them enforced or have a return of what has been parted with in their performance; it denies both; and, hence, there can be no proper application, in such cases, of the rules which govern the rescission of contracts."

In *Beard vs. Beard*, 65 Cal. 356, (4 Pac. 229), it appeared that the plaintiff transferred real and personal property to the defendant in consideration of her executing to him four notes, and securing the payment of the same by a mortgage, and *abandoning her defense* in an action of divorce then pending between them, and doing nothing to resist or prevent or delay him in obtaining a decree of divorce

therein. He seeks in this action to recover the amount so secured. The defense is that the notes and mortgages are so tainted by fraud that a Court ought not to enforce them.

The Court says:

> "The agreement between the parties in the divorce proceedings was clearly collusive—'a secret agreement and co-operation for a fraudulent purpose.' The decree of divorce obtained in pursuance of it was obtained through fraud on the Court. If the Court had been advised of that agreement it would not have granted the divorce."

Continuing, the Court says:

> "In *Barnes vs. Barnes*, L. R. 1 Prob. & Div. 505, a decree *nisi* had been rendered, when it was made to appear to the Court that the petitioner had, in substance, said to his wife, the respondent: 'If you don't oppose, I shall get a divorce cheaper than if you do; therefore, keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent.' The decree was rescinded and the petition dismissed, Creswell, J., remarking:
>
> " 'If that is not collusion, I do not know what is.'
>
> "It would not be 'collusion' within the definition of that term in our court (Civil Code, 114), but it would be none the less a fraud on the Court, and in contravention of the policy of the law. The law-making powers, for reasons which it is unnecessary here to state, have made a distinction between divorce and other cases by declaring that 'no divorce can be granted upon the default of the defendant.' (*Id.* 130.)
>
> * * *
>
> "And the objection is not obviated by the suggestion that for anything which appears the *defendant may have had no defense* to the action in which

the divorce was obtained. It appears that she filed an answer denying the allegations which constituted the ground for a divorce, and that she *abandoned her defense.* Whether a divorce would have been granted if she had not is quite immaterial. * * * We shall confine our investigation to what was done, and will not inquire what might have been the result of a fair trial of the issues. **If, on the *bona fide* trial, the plaintiff** could have established the allegations of his complaint, there was no occasion for his procuring an abandonment of the defense. * * *

"In this case the agreement of the defendant to abandon her defense in the divorce case, and to give the notes and mortgage, were parts of one and the same transaction, and constituted the consideration of the transfer of the property by the plaintiff to her. And we are warranted in assuming that the transfer would not have been made if the defendant had not agreed to abandon her said defense, as well as to execute the notes and mortgage.

"As we view it, this case is clearly within the reason of the maxim, '*Ex turpi causo non oritur action.*' The entire transaction between the parties is tainted by fraud, and the plaintiff must content himself with so much of the benefit of it as he has already secured unchallenged. The reason why the common law says such contracts are void is for the public good, and we think that the public good requires that this transaction should be held to be void in all its parts. It was a contract which contemplated the perpetration of a fraud upon a court of justice, and we think it the duty of Courts to discountenance and discourage such transactions to the utmost limit of our power."

See, also, *Tappan vs. Brewing Co.*, 5 L. R. A. 428.

The statutes creating the Tensas Levee Board gave it no power to compromise fraudulent transactions. Indeed, the control of all cases involving "the titles to any land or real property belonging to the State of Louisiana, **or any of its political agencies or subdivisions,** whether the title to said lands or real property is vested in or appears in the name of the State or in the name of **any of its political agencies or subdivisions,**" is vested in the Governor and the Attorney-General by Act No. 3 of the Extra Session of the 1910 Legislature. These officials took control of this case, and neither of them has ever consented to the compromise thereof. The Levee Board had no authority to make the compromise.

See *Board of Health vs. Teutonia Bank*, Vol. 68 So. Rep., No. 9 (Ad. Sheets), 748, holding the Board of Health without authority to compromise.

Keeping in mind that a fraud has been committed, and that the interests of the public are at stake, we ask, in conclusion, that the writ of certiorari prayed for be granted, and that the Court enter judgment permitting the State of Louisiana to prosecute an appeal from the judgment ratifying the said compromise, and reversing the judgment of the United States Circuit Court of Appeals and United States District Court.

Respectfully submitted,

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For Petitioner, The State of Louisiana.

G. A. GONDRAN,
DANIEL WENDLING,
Of Counsel.

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No. ——.

Supreme Court of the United States

OCTOBER TERM, 1915.

STATE OF LOUISIANA,

Petitioner,

versus

TENSAS DELTA LAND COMPANY *ET ALS.*,

Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals of the Fifth Circuit.

BRIEF IN OPPOSITION TO THE ALLOWANCE OF THE WRIT.

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STATE OF LOUISIANA,

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Respondents.

APPENDIX TO BRIEF OF RESPONDENTS IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI, CONTAINING SUBJECT DIGEST AND LIST OF CASES CITED.

SUBJECT DIGEST.

FIRST. This Court will not grant a writ of certiorari to the United States Circuit Court of Appeals to review its decision, rendered nearly a year before the date of the application to this Court, when the decision of the Circuit Court of Appeals had passed beyond its control by the conclusion of the term at which the decree was entered, where no rehearing was asked in that court, and no application for delay was asked to give the party an opportunity to apply to the Court. Particularly is this true in a case where the decision of the Court of Appeals was one affecting its own appellate jurisdiction in a case between citizens of different States involving no Federal question.

Pages 2 and 3.

SECOND. Special and detailed statement of facts.

Pages 4 to 16, inclusive.

THIRD. Even if the procedure on appeal in a court of equity of the United States were governed by the provisions of the Louisiana Code of Practice, the State has not made out its case as required by the settled jurisprudence of Louisiana interpreting Article 571 of that Code.

Pages 17, 18 and 19.

FOURTH. But the Louisiana Code of Practice, in regard to appellate procedure in the courts of that State, has no application whatever to proceedings by appeal or by writ of error in courts of the United States.

Pages 19 to 22.

FIFTH. The State of Louisiana was no party to the record in the United States District Court in the case of *Board of Commissioners of the Tensas Basin Levee District vs. Tensas Delta Land Co., Ltd.*

It was not a party expressly. Nor was it a party impliedly, or a *quasi* party, because it had no interest of its own which it could stand in judgment on as an express party. Its rights as a *quasi* party could not be greater than its rights as a direct party.

Page 22.

SIXTH. The State of Louisiana is without legal interest in the subject-matter of this suit, as decided by the Supreme Court of Louisiana in the case of *State vs. Tensas Delta Land Co., Ltd.*, 126 La. 59, and, hence, has no right to intervene.

Pages 23 to 30.

SEVENTH. Not being a party to the record in the United States District Court, nor to the decree entered by request of complainant and defendant dismissing the cause under a compromise between them of the issues involved, the State had no right to appeal from that decree.

Pages 30 and 31.

EIGHTH. No appeal lies from the order denying the State leave to intervene in the case—an application made after the decree dismissing the cause became final by the elapsing of the term of the court at which it was rendered—and inasmuch as the leave was denied, and the State of Louisiana never became party to the cause, it follows that no appeal lies from the order dismissing the suit.

Pages 31 to 45.

NINTH. The Levee Board acted in unquestioned good faith in entering into the compromise of the suit between it and the Land Company; and, inasmuch as the public interests in these lands were confided by law to that body, it is clearly within the discretion of the trial Court to deny to all others the right to intervene and appeal, leaving to the State to protect any interest it might have by a direct action.

Pages 45 to 52.

TENTH. The fact that the Attorney-General was by law the counsel of record of the Levee Board does not give him the right to appeal the cause or to carry on the litigation contrary to the will of his cilent.

Pages 52 to 61.

ELEVENTH. The law favors the compromise of disputed claims, and the Civil Code of Louisiana makes express and detailed provision therefor.

Pages 61 to 67.

TWELFTH. A charge of fraud in a bill to recover lands, denied in detail under oath, does not take away the right of the Levee Board to compromise the suit.

Pages 67 to 76.

THIRTEENTH. The Land Company, in compromise of the suit, paid the Levee Board $100,000, which went to the Levee Board's credit in the State treasury. This compromise was a new contract, and in no event could the compromise be rescinded except upon the repayment of this sum to the Land Company and the parties restored to the *status quo*. This rescission cannot be had by an appeal by the State from the order dismissing the original litigation compromised. The State has made no offer to repay the sum, the repayment of which is a condition precedent of any action to set the compromise aside, directly or indirectly.

Pages 76 to 82.

FOURTEENTH. Attention again called to the fact that no attack is made on the compromise of July 11, 1913, between the Levee Board and the Land Company, except the bare assertion of the Attorney-General that it was the compromise of a fraud, when the questions in issue were fraud *vel non*, and whether, if there were fraud, the action to recover the lands was barred by the limitation of ten years. The good faith, business judgment and the conduct of the Levee Board in making the compromise are not impugned in any manner.

Page 82.

FIFTEENTH. The claim that Act No. 3 of the Extra Session of 1910 took away from the Levee Board, and from the State, and from every political subdivision of the State, all control over all litigation over lands when the Governor directed the Attorney-General to sue for the recovery of lands, is without warrant in law or in fact.

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On Petition for a Writ of Certiorari to the Circuit Court of Appeals of the Fifth Circuit.

BRIEF IN OPPOSITION TO THE ALLOWANCE OF THE WRIT.

GENERAL STATEMENT.

By this proceeding, R. G. Pleasant, Attorney General of the State of Louisiana, in the name of the State of Louisiana as the litigant, seeks by *certiorari* to get this Court to

review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered on October 29, 1914, denying his application for writs of mandamus and *certiorari* to the United States District Court for the Western District of Louisiana, to compel the Judge of that court to allow a petition of intervention to be filed by the State of Louisiana and an appeal to be granted to the State to the said Circuit Court of Appeals from a final decree entered by the United States District Court for the Western District of Louisiana on October 21, 1913, in the case styled *"Board of Commissioners of the Tensas Basin Levee District vs. The Tensas Delta Land Company, Limited."*

This Honorable Court was in session when the decree of October 29, 1914, was entered by the United States Circuit Court of Appeals refusing to permit an appeal to itself in a case between citizens of different States, not involving any Federal question, and of which it had sole jurisdiction on appeal. This Honorable Court remained in session for seven months after the decree complained of was entered. The Circuit Court of Appeals likewise remained in session for eight months after this decree was entered, and no application was made to it for a rehearing. This decree thus became final in the Circuit Court of Appeals, and by the expiration of the term at which it was rendered, passed absolutely beyond the control of that Court.

Will this Honorable Court at this late date issue a writ of *certiorari* to review the decision of the Circuit Court of Appeals?

We respectfully submit that it will not.

True, there is no limit of time placed by law within which this Court must exercise its power to issue such writ, but it has been generally held among the profession that

the writ must be applied for before the decree passes beyond the control of the Circuit Court of Appeals, and the practice has prevailed to apply to that Court for a delay in which to apply to this Honorable Court for a writ of *certiorari*, which delay is invariably granted. No such application was made in this cause.

We know of no precedent for a proceeding like this.

No explanation is tendered for delaying this application from October 29, 1914, to October 11, 1915.

Nor was there any explanation for delaying from October 21, 1913, the date of the entry of the decree in the United States District Court to April 6, 1914, the filing of the application of the State to intervene in the cause and to appeal from the decree.

The State had ample opportunity to intervene in the cause before the final decree was entered. The compromise complained of was made July 11, 1913. The Attorney General, in his capacity as attorney of the Levee Board, was notified on July 19, 1913, by a formal rule taken on him, that the compromise would be pleaded as a termination of the cause. He had three months before the hearing of this rule came on to intervene in behalf of the State. He not only did not make application to intervene during that period before the entry of the final decree, but he waited until the delay for appeal from that decree had expired to within fifteen days of the six months' limit before he sought to intervene and appeal.

From these and the other unexplained delays in taking action in the case, it would appear that the Attorney General of Louisiana sought to make the cause *"a linked sweetness, long drawn out."*

SPECIAL STATEMENT OF CASE.

The Board of "Commissioners of the Tensas Delta Levee District" was by various acts of the Louisiana Legislature (Act No. 26 of 1884, Act No. 59 of 1886, and Act No. 77 of 1888) "constituted and created a body politic, with corporate powers, to sue and be sued in their corporate capacity, to have a seal, to levy taxes and assessments, and to issue and sell its corporate bonds." The object and purpose of the corporation was to develop, establish and complete, either within or without the State, a system of levees and other works of public improvement designed to aid in protecting from floods and overflows property in the Tensas Basin Levee District, composed of certain parishes situated in the basin of the Tensas River.

Warrant for this legislative action is found in Article 214 of the Louisiana Constitution of 1879.

It was provided by Act 77 of 1888, that "in order to provide additional means to carry out the purposes of the corporation," all the lands then or thereafter owned by the State within the district, both those granted to the State by the United States, and those forfeited to the State for nonpayment of taxes "*are hereby given, granted, bargained, donated, conveyed and delivered*" unto said Board. The Auditor and Register of the State Land Office were required

> "*on behalf of and in the name of the State, to con-*
> "*vey to said Board of Levee Commissioners, by*
> "*proper instrument of conveyance,* the lands hereby
> "granted or intended to be granted and conveyed to
> "said board, whenever from time to time said Audi-
> "tor and said Register of the Land Office, or either
> "of them, shall be requested to do so by said Board
> "of Levee Commissioners or by the president thereof;

"and thereafter said president of said Board shall "cause said conveyances to be properly recorded in the "Recorder's office of the respective parishes where- "in said lands or any part thereof may be located, and when said "conveyances shall be recorded the title to said lands "with the possession thereof, *shall from thenceforth* ***"vest absolutely in said Board of Levee Commis- "sioners, its successors or grantees.*** * * * "Said Board of Levee Commissioners shall have the **"power and authority to sell, mortgage, pledge or "otherwise dispose of said lands in such manner "and at such times and for such prices as to said "Board shall seem proper."**

The lands thus conveyed to this Board consisted on the face of the record of 885,040 acres, but the large majority of the lands were held by the State as forfeited to it for taxes. In the sworn answer filed by the Tensas Delta Land Company, Limited, in this cause it appears that the Levee Board had title to only 580,000 acres of the land thus conveyed, of which 20,000 acres were absolutely worthless.

In November, 1898, ten years after the grant was made, the Levee Board, having tried in vain to sell these lands for fifty cents an acre, sold *without any warranty* whatever, the lands it had received from the State, to the Tensas Delta Land Company, Limited, a Michigan limited partnership, composed of non-residents of the State of Louisiana, for $130,000, paid $30,000 cash and the balance in one, two and three years, with six per cent. per annum interest.

On November 6, 1909, *eleven years after the sale was made, and after the lands had become valuable because of the growth of the country, and after the building of levees with funds obtained from the sale of the lands and from the large special taxes and assessments levied upon them by the*

Tensas Delta Levee District, and after eight of the persons connected with the transaction were dead, the State of Louisiana brought a suit in her own courts to set this sale aside and to recover the unsold lands and the proceeds of the lands sold.

The grounds of this action were that the sale was brought about by fraud and inferential bribery; that, if the sale was not fraudulent, it was a disguised donation, and if not a disguised donation, it was annulable for *lesion beyond moiety.*

To this action defendant pleaded that the State was without interest and could not maintain the action. This plea was sustained and the suit dismissed. The State appealed to the Supreme Court of Louisiana, which affirmed the judgment of dismissal. Application for rehearing was made and denied.

This case is reported in 126 La. 59.

After the above decision became final the Board of Commissioners of the Tensas Delta Levee District, on July 14, 1910, adopted a resolution directing its attorney, M. C. Thompson, to bring suit in its name to recover these lands, and to get into communication with the Attorney General and with him to prepare, file and prosecute said suit.

After this action had been taken by the Levee Board, the Legislature adopted Act No. 3 of the Extra Session of 1910, approved August 19, 1910, which provides that:

> "It is hereby made the duty of the Attorney Gen-
> "eral of the State, upon the request of the Governor,
> "to represent the State, or political agency or sub-
> "division of the State, in any suit in any court in-
> "volving title to any land or real property belonging
> "to the State of Louisiana, or any of its political

"agencies or subdivisions, whether the title to said "land or real property is vested in or appears in the "name of the State, or in the name of any of its po- "litical agencies or subdivisions."

Acting upon this statute, the Governor on January 4, 1911, directed the Attorney General to institute suit for the recovery of these lands "*for the use and benefit of and in the name of the Tensas Basin Levee Board.*"

On September 15, 1911, the Tensas Basin Levee District, appearing by its attorney, M. C. Thompson, under the above mentioned resolution of July 14, 1910, and also by the Attorney General under the above mentioned instructions of the Governor, instituted suit in the State Court of Ouachita Parish to set aside the sale of November 4, 1898, to recover the unsold lands and the proceeds of the lands sold. The averments of the petition in this case were the same as those of the dismissed action by the State.

The defendants, being all citizens of States other than Louisiana, removed the cause into the United States District Court for the Western District of Louisiana, filed the record there and took a rule on plaintiff to reform its pleadings into a bill in equity in conformity to the rules prescribed by the Supreme Court of the United States. Plaintiff acquiesced in this rule and got an order permitting it to file a supplemental and amended bill. The reformed pleadings and the supplemental and amended bill were filed as one proceeding.

The greater part of this new bill was taken up with correcting and modifying the averments of the original bill, particularly those as to the participation of the Levee Board itself in the alleged fraud, and those as to the value of the property, they being cut in two by the new bill.

This bill was utterly defective and without equity:

FIRST. Because the action being barred on the face of the bill by the limitation of ten years, it contained no averments to take the case out of the operation of the statute, except the bare statement that the Board did not discover the fraud until October 13, 1909, eleven years after it was charged to have been perpetrated.

SECOND. Because it did not offer to do equity by returning the purchase price of the lands with interest, nor the large amounts of taxes levied and collected on the lands, nor the costs and expenses of selling the lands, nor the costs and expenses of preserving and guarding the lands from trespassers.

THIRD. Because it sued to recover the purchase price of the lands sold, and declined to ratify the sales so made.

FOURTH. Because, so far as it sought to annul the sale as a disguised donation (on its face an absurd averment), it was barred by the statute of limitation of ten years.

FIFTH. Because, so far as it sought to set aside the sale for lesion beyond moiety, it was barred by the statute of limitation of four years.

The defendants filed general and special demurrers, setting up the above grounds, and, inasmuch as the bill charged fraud, filed an answer in support of the demurrers, denying every averment in the bill charging fraud and conspiracy, and every averment from which fraud could be inferred, and setting up the true facts. This answer was filed to fortify the demurrers, and was filed in compliance with the practice in the Fifth Circuit, as declared in *Johnson vs. Forsyth Mercantile Company*, 127 Fed. 845, such being the general rule

of equity practice, though specifically required by the equity rules of the United States Supreme Court only in the case of a plea.

These demurrers were set down for argument, were argued and submitted.

On the day fixed for the decision of the case the complainant appeared and asked leave to file a *second* amended bill. The Court, considering that the proffered amendments did not make the bill good, refused the proffered amendments and entered a decree dismissing the bill.

From this decree the Levee Board appealed to the United States Circuit Court of Appeals, taking this appeal only fifteen days before the delay for appeal would expire. That Court reversed the decision and held that the proffered amendments would make the bill a good bill. This decision was in utter disregard of the settled jurisprudence of the Supreme Court of the United States in a long line of decisions stretching from *Sterns vs. Page*, 7 How. 819, through *Wood vs. Carpenter*, 101 U. S. 135; *National Bank vs. Carpenter*, 101 U. S. 567, to *Wodensac vs. Reiher*, 115 U. S. 102; *Hammond vs. Hopkins*, 143 U. S. 274; *Felix vs. Patrick*, 145 U. S. 332; *Foster vs. R. R. Co.*, 146 U. S. 88; *Boone vs. Burlington R. R.*, 139 U. S. 693; *Hardt vs. Heidweyer*, 152 U. S. 559; and the opinion did not even refer to that jurisprudence or the principles laid down by it.

The cause was remanded to the District Court, allowing the defendants twenty days to answer. The defendants obtained from that Court a delay to answer until the rule day in August.

On July 11, 1913, the Board of Commissioners of the Tensas Basin Levee District, by proper resolution, tendered to the defendants a compromise of this litigation upon the condition that the defendants should pay the Board the sum

of $100,000. This proposition was accepted, and on the same day the parties appeared before a notary and executed a formal act of compromise, the $100,000 being paid by a ten-day draft, which draft was paid at maturity and the proceeds deposited in the treasury of the State of Louisiana to the account of the Board of Commissioners of the Tensas Basin Levee District.

By this act of compromise, which both parties declared they preferred to the hope of gaining balanced by the fear of losing in the litigation between them, in the United States District Court, in cause No. 694 of its docket, styled *Board of Levee Commissioners of the Tensas Basin Levee District vs. Tensas Delta Land Company*, they agreed to forever end and set at rest all the matters and things set up and contained in the original and amended bills of complaint in said cause, and to forever set at rest all questions relating to the validity of the titles of the Tensas Delta Land Company, purchased by the latter in November, 1898. In consideration of the payment the Levee Board agreed to dismiss the litigation at its cost. The compromise further ratified, confirmed and approved a previous compromise made between the parties on July 9, 1903.

On July 19, 1913, the defendants, setting up the compromise and the payment of the price thereof, and that the compromise had the effect of the thing adjudged between the parties, laid a rule on the Levee Board and on R. G. Pleasant, Attorney-General, as the attorney of record of the complainant, to show cause why the cause should not be dismissed, and praying that until this rule could be heard all further proceedings in the cause be stayed.

The Court made this rule returnable on the first day of the next term of the court at Monroe, which took place in October.

On the same day this rule was filed the Secretary of the Levee Board, under the Board's direction, addressed a letter to the Attorney-General, as counsel of record for the Board, requesting him to dismiss this case in accordance with the compromise, a copy of which had been transmitted to him on the 14th.

He evidently declined to obey the instructions of his client. Consequently the Levee Board, through its president, T. V. Gilbert, on August 5th, filed a return to this rule, asking that it be made absolute and the suit dismissed. This action of the president was ratified by a formal resolution of the Board adopted October 9, 1913.

On October 6th, before the return day of this rule arrived, the Attorney-General, as attorney of the complainant, filed his answer to the rule, objecting to the recognition of the compromise and the dismissal of the suit, on the grounds:

> "FIRST. The said suit is based upon a fraudu-
> "lent sale of nearly 900,000 acres of land belonging
> "to the complainant, and the said fraud vitiates the
> "contract of sale.
>
> "SECOND. A fraudulent sale of public lands
> "cannot be ratified and approved by a subsequent
> "agreement between the vendor and the vendee. Only
> "a new legal and honorable sale, for an adequate con-
> "sideration, can operate a transfer of property. The
> "ratification of a fraud is no more legally binding
> "than the perpetration of the original fraud itself,
> "and no governmental agency or subdivision or court
> "can justify the one nor condone the other.
>
> "This results not only from the positive expres-
> "sions of the law, not only because it is *contra bonos*
> "*mores* and against public policy, but also because it
> "is inherently one of the fundamental objects of gov-
> "ernment to prevent and punish fraud, and especially

"fraud against the sovereign. Government and "fraud are basically antagonistic. Either fraud must "be condemned and government upheld, or fraud up- "held and government abandoned.

"The motion to dismiss this suit states that the "differences between the parties thereto have been "settled and compromised by the payment of $100,000 "by defendant to complainant. The only point in "dispute was the question of fraud, all others being "abandoned during the progress of the case, as shown "in the judgment of this Honorable Circuit Court of "Appeals, and by admission of complainant's counsel "in open court."

[This statement is without foundation in fact. Counsel abandoned nothing but the plea of prescription of one year. The plea of prescription of ten years still remains. Complainant will have to prove all its averments to escape the operation of this limitation. Every averment in the bill from which fraud could be averred was denied under oath. In deciding the case the Circuit Court of Appeals said: "In deciding the questions raised by the demurrers, we have assumed, as required by the rule, that the averments of fact in the bill are true. If the cause comes to trial, the defendant will not be prejudiced by what we have said should the evidence show a different state of facts from that alleged."]

"The question compromised, therefore, was that "of fraud, and nothing else, and the Court should not "favor wrong instead of right by dismissing a suit "of which it has full and complete jurisdiction.

"THIRD. Complainant should not be permitted "to use the court and its process for the purpose of "condoning and compromising fraud for money.

"FOURTH. The Attorney General cannot dis- "miss this suit without express authority from the

"Governor of the State of Louisiana, so to do for the "reason that his right to represent complainant "herein and prosecute this suit was conferred upon "him by the Governor under the provisions of Act "No. 3 of the Extra Session of the General Assembly "for the year 1910, and said right has never been "withdrawn; that the Attorney General is not an- "swerable to the complainant for his management of "this suit; nor is he bound to dismiss same at the "request of said complainant; that the effect of said "Act of the Legislature is to place the Governor in "supreme charge of this and similar suits in the "event he chooses to proceed under the Act in any "particular suit; that the Attorney General is di- "rectly responsible to him, and to him alone; that "it was the intention of the Legislature, in passing "the statute above cited, to give to the Governor, and "through him to the Attorney General, the control "of suits of this character, and on account of this "control prevent the compromise of the public's "rights and interests, such as the Board of Commis- "sioners of the Tensas Basin Levee District has at- "tempted to do in the present instance; that the com- "plainant cannot compromise this suit, nor the Court "dismiss it, without the Governor's consent in any "event.

"Wherefore, respondent prays that defendant's "motion to dismiss be denied, that the agreement "upon which it is based be disregarded, that defend- "ant be ordered to file its answer to the complainant "immediately, and that the trial of this case on the "merits be proceeded with without delay.

"Further prays for all necessary orders and gen- "eral and equitable relief.

"R. G. PLEASANT,

"Attorney General State of Louisiana and Attorney "of Record for Complainant."

The Attorney General did not appear on the first day of the October term of the United States District Court to back up his objections. The Judge says in his return that for that reason he deferred the hearing to the next day and caused a telegram to be sent to the Attorney General in order to give him full opportunity to be present and heard upon the motion to dismiss the suit. He still did not appear. The compromise was proven, the payment of the $100,000 into the State treasury was shown, and for reasons given by the Judge the order was entered on October 21, 1913, dismissing the cause as asked for, both by the complainant and the defendant.

Nothing was heard from the Attorney General until April 6, 1914, when the State of Louisiana, appearing by the Attorney General, asked leave to intervene and appeal from the said judgment.

As stated above, the decree had become final by the adjournment of the court for the term, and the delay for appeal had elapsed to within a margin of fifteen days, claiming that she was aggrieved by said judgment.

The Judge below refused both the application to intervene and the application for an appeal.

Thereupon the State made application to the United States Circuit Court of Appeals for the Fifth Circuit for writs of mandamus and *certiorari*. The Court ordered a rule to be taken on the Judge to show cause why the writs should not issue. He made full and detailed returns, giving reasons for his action as follows:

> "FIRST. The State of Louisiana is without legal "interest in the subject-matter of this suit, and has "no authority in its own name or right to carry on "the litigation, and it was so specifically held by the "Supreme Court of Louisiana in the cause entitled

"*State vs. Tensas Delta Land Company, Limited,* re-
"ported in 126 La. 59.

"SECOND. Inasmuch as the State of Louisiana
"was not a party to the suit, it had no appealable in-
"terest or standing in a court of equity to ask for an
"appeal, even admitting, *arguendo,* that it had the
"same time within which to appeal as that possessed
"by a party to the suit.

"THIRD. The petition of the Honorable Attor-
"ney General, asking leave, in the name of the State
"of Louisiana, to intervene in the cause, was one
"which, in my opinion, appealed to my discretion as
"Chancellor, and in the exercise of that discretion
"I deemed it best to deny the petition, and this in
"particular in view of the fact that the State had
"already had its day in court and had been adjudged
"by the highest Court of its own sovereignty to be
"devoid of legal interest in the subject-matter of the
"litigation. The intervention being denied, it fol-
"lowed, in my opinion, as a logical consequence, that
"no right to appeal existed, and appeal was also
"denied.

"FOURTH. Independent of the previous decision
"of the State Court in the case in the 126th Louisi-
"ana, it is my view that the merely general nature
"and character of the interest alleged by the State
"in the subject-matter of the litigation are not such
"as to entitle the State to appeal from the decree of
"dismissal of October 21, 1913, especially in view of
"the fact that such decree is based upon the consent
"of both parties to the record and the good faith of
"the members of the Levee Board in making the
"compromise is not questioned.

"FIFTH. The Honorable Attorney General of
"Louisiana did not show any authority to apply for
"leave to intervene or appeal, other than as arises

"from his office as Attorney General or his position "as solicitor and of counsel for the Levee Board in "the suit pending in said District Court; and, in my "opinion, there existed in him no right or authority "in either capacity to carry on the litigation or appeal "the cause contrary to the wishes and best judgment "of his client, the Board of Levee Commissioners of "the Tensas Basin Levee District, which, for a valu- "able consideration, and upon mature deliberation, "had seen fit voluntarily to compromise the same.

"X.

"For the reasons already stated, I am of opinion "that the petitioner has no paramount and superior "right as a sovereign State to intervene in said suit "No. 694, and that it is not entitled, as a matter of "law or equity, to appeal to this Honorable Court "from said decree of October 21, 1913, ratifying said "compromise, as aforesaid."

After full hearing, the United States Circuit Court of Appeals on October 29, 1914, denied both writs, giving as its reasons the following:

"1. Under the decision of the Supreme Court of the State of Louisiana, reported in *State vs. Tensas Delta Land Co., Ltd.*, 126 La. 59, the Supreme Court of the State, on full consideration, decided that the State was without real or beneficial interest in the lands in controversy, and this decision is controlling in this court.

"2. One who is not a party to a record and judgment is not entitled to an appeal therefrom. (*Bayard vs. Lombard*, 9 How. 530; *Indiana vs. Liverpool & London & Globe Ins. Co.*, 109 U. S. 168; *Ex Parte Cockroft*, 104 U. S. 578; *Ex Parte in the Matter of Leaf Tobacco Board of Trade of the City of New York, Petitioner*, 222 U. S. 578, 581.)"

It is this decision which the State now seeks to overthrow in this court.

In this proceeding in this court, the State has apparently abandoned its application for an appeal from the judgment refusing to permit it to intervene in the case of *Board of Commissioners of the Tensas Basin Levee District vs. The Tensas Delta Land Co., Ltd.*, and has confined its claim to an appeal from said judgment to two grounds:

FIRST. Under the provisions of Article 571 of the Code of Practice of the State of Louisiana.

SECOND. On the ground that it was a *quasi* party to the record.

ARGUMENT ON THE LAW.

I.

Section 571 of the Code of Practice of Louisiana provides:

> "The right of appeal is given not only to those "who were parties to the cause on which a judgment "has been rendered against them, but also to third "persons to such suit, when such third persons allege "that they have been aggrieved by the judgment."

Even though a statute of the State of Louisiana, governing the proceedings in its courts, could govern the procedure on appeal in a Federal Court of Equity, and even though the right of appeal in this cause should be regulated and determined by Section 571 of the Code of Practice of the State of Louisiana, it is the settled jurisprudence of Louisiana that the third person seeking an appeal must not only allege that he had been aggrieved by the judgment, but

he must in fact have an interest in the subject-matter of the litigation which is affected by the judgment sought to be appealed from, and he must prove that interest.

In *Lacroix vs. Menard et als.*, 7 Martin (N. S.), 345, decided in 1829, four years after the Code of Practice went into effect, the Supreme Court of Louisiana said:

> "This Court has already decided that when persons not parties to a judgment appeal from it, they must allege and prove in the court of first instance their right to do so; that is, they were aggrieved by it. The correctness of this mode of carrying the 571st Article of the Code into effect has been strongly contested in argument, but after much reflection we do not see what other course can be adopted. The fact of a party being aggrieved by judgment rendered between others is an indispensable condition to his right of appealing. That right must be established somewhere before the correctness of the judgment complained of can be examined into. It cannot be tried in this court, and it must be in that below, or the statute would become a dead letter."

This decision was confirmed and the opinion quoted with approval in *Fazende vs. Flood*, 24 Ann. 425.

See also:

> *Arrowsmith vs. Rappelge et al.*, 19 Ann. 327; *State ex rel. Belden vs. Markey*, 21 Ann. 743; *Block, Britton & Co. vs. Barton, Miller & Co.*, 27 Ann. 89; *Guilbeau vs. Detiege*, 32 Ann. 911.

In the case above quoted, *State ex rel. Belden vs. Markey*, 21 Ann. 743, it was claimed that the affidavit of the third person appellant of his interest and of his being

aggrieved by the judgment was binding on the Court, but the Court overruled this claim.

City vs. Dufossat, 46 Ann. 398; *Bland vs. Edwards,* 52 Ann. 822; *Board of Liquidation vs. N. O. Waterworks Co.,* 39 Ann. 202.

The Attorney General seems to think that all he has to do is to aver that the State is aggrieved by the judgment, make affidavit to his petition and that the State is then entitled to an appeal of right. As shown below, the State has no interest in this litigation.

II.

It is true that the Courts of the United States have held that where a State statute gives a right, the Federal Courts will give the remedy, but mere methods and rules of procedure provided by State statutes for the courts of the State do not apply to the Federal Courts of Equity, or to appellate procedure in those courts. These rules of State procedure are not the rights covered by the rule.

By the provisions of Section 913 of the Revised Statutes of the United States, which is taken from the Process Act of May 8, 1792, all suits in equity in the Circuit and District Courts in the United States, forms and modes of procedure, shall be according to the principles, rules or usages which belong to Courts of Equity. In *Hurst vs. Hollingsworth,* 100 U. S., page 100, at page 103 this Court said that the requirement of this statute has always been obligatory upon parties and the Court wherever the question has been raised.

This rule is also true as to all proceedings in error in cases at law in the Federal Courts, which cases, by Section

914, Revised Statutes of the United States, are required in practice, pleadings and forms and modes of procedure to the State law.

In *United States vs. Train*, 12 Fed. 852 (C. C.), in an opinion by Justice Gray, it was early held that the taking of a case from one Federal Court to another by writ of error or appeal is regulated exclusively by the Acts of Congress, or, when those are silent, by rules derived from common law, from ancient English statutes, or from the practice of the Courts of the United States.

This rule has been recognized in many later cases.

> *Chateaugay Ore & Iron Company, Petitioner*, 128 U. S. 544, 553-555; *St. Clair vs. United States*, 154 U. S. 134, 153; *Ghost vs. United States* (C. C. A.), 168 Fed. 841, 843; *Logan vs. Goodwin* (C. C. A.), 104 Fed. 490; *Menge vs. Warriner* (C. C. A.), 120 Fed. 816, 817; *Francisco vs. Chicago & A. R. Co.* (C. C. A.), 149 Fed. 354, 358, 359.

In *Chateaugay Ore & Iron Company, Petitioner*, 128 U. S. 544, 553-555, in an opinion by Mr. Justice Blatchford, it is said:

> "We are of opinion that the practice and rules of the State Court do not apply to proceedings in the Circuit Court taken for the purpose of reviewing in this court a judgment of the Circuit Court, and that such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within the 'practice, pleadings, and forms and modes of proceeding' in the Circuit Court, which are required by Section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), to conform 'as near as may be' to the 'practice, pleadings, and

forms and modes of proceeding existing at the time in like causes in the courts of record of the State' within which the Circuit Court is held, 'any rule of court to the contrary notwithstanding.' * * *

"The manner or time of taking proceedings as a foundation for the removal of a cause by a writ of error from one Federal Court to another is a matter to be regulated exclusively by Acts of Congress, or, when they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the Courts of the United States."

In *St. Clair vs. United States*, 154 U. S. 134, 153, it is said:

"What is necessary to be done in a Circuit Court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or revised in this court, depends upon the Acts of Congress and the rules of practice which this court recognizes as essential in the administration of justice."

Menge vs. Warriner, 120 Fed. 816, 817, is a decision of the Circuit Court of Appeals of the Fifth Circuit, delivered by Circuit Judge Shelby, in which he says that the question of the finality of a judgment or decree for the purposes of review by a writ of error or appeal in the Federal Courts is not affected by the procedure in the State Courts, but must be governed by the rules established by Federal legislation and by the decisions of the Federal Courts.

In *Francisco vs. Chicago & Alton R. R. Co.*, 149 Fed. 354, 358-359, Judge Sanborn, speaking for the Court of Appeals of the Eighth Circuit, says of the Conformity Act that

"Section 914 is limited by its express terms to the practice and proceedings in the Circuit and District

> Courts to procure their judgments. It has no application to the practice or proceedings of the Federal Appellate Courts or to any matters relating to bills of executions, motions for new trials, or any other means adopted to review the judgments of the Circuit or District Courts. The power and practice of the Federal Appellate Courts are derived exclusively from the Constitution, the Acts of Congress, the common law, the ancient English statutes and the rules and practice of the Courts of the United States, and they may not be extended, diminished, controlled or affected by the statutes of the States or the practice of their courts."

III.

The State of Louisiana was no party to the record below either directly or indirectly, neither as an actual party nor as a *quasi* party.

The Attorney General works out his theory of the State being a *quasi* party by asserting that

> "the Levee Board is really a nominal party, since "the lands are lands of the State, confided to the care "of an instrumentality of the State which is subject "to the paramount authority of the State, and the "State is in a legal sense a *quasi* party and entitled "to appeal."

If the State could not be a direct party as complainant to set aside the sale of the lands in question by the Levee Board, as held by the Supreme Court of Louisiana, how could she be a *quasi* party to suit to set aside the sale?

IV.

The State of Louisiana is Without Legal Interest in the Subject-Matter of This Suit, and Has No Authority in Its Own Name or Right to Carry on the Litigation, and Hence No Right to Intervene.

In order to substantiate this it is necessary only to refer to the act creating the Levee Board and the decision of the Supreme Court of Louisiana interpreting the same.

The Tensas Basin Levee District was created by the Legislature of Louisiana, by Act No. 59 of the session of 1886. Section 3 of that act constitutes and creates the Board of Levee Commissioners of the Tensas Basin Levee District to be a body politic, with corporate powers, to sue and be sued in their corporate name, to have a seal and to have the power to do and perform all purposes of the act, etc. The section reads as follows:

> "That the said commissioners shall constitute a 'Board of Levee Commissioners of the Tensas Basin Levee District,' and they shall be and they are hereby constituted and created into a body politic with corporate powers; they shall have power to sue and shall be sued in the corporate name, and shall have a seal, and shall have the power to do and perform all the purposes of this act; the domicile of this corporation shall be at the Town of Rayville, in the Parish of Richland, and it shall be sued there, and service of citation shall, in all cases, be made upon its president, either in person or at his domicile during his absence wherever he may reside, as in the case of ordinary suits."

Act No. 77 of 1888 is amendatory of the act above referred to, and by virtue of this amendatory act the lands

which are the subject of this litigation were conveyed by the State of Louisiana to the Levee Board. This act contains the following provisions:

> "All lands now belonging or that may hereafter belong to the State of Louisiana and embraced within the limits of the Tensas Basin Levee District, as herein constituted, shall be, and the same are hereby given, granted, bargained, donated, conveyed and delivered unto said Board of Levee Commissioners of the Tensas Basin Levee District, whether said lands are part of lands originally granted by the Congress of the United States to this State, or whether said lands have been or may hereafter be forfeited to or bought in by or for or sold to the State at tax sales, for nonpayment of taxes," etc.

The act further provides:

> "The Auditor and Register of the State Land Office of the State of Louisiana shall, on behalf of and in the name of the State, convey to said Board of Levee Commissioners, by proper instrument or conveyance, the lands hereby granted or intended to be granted and conveyed to said Board, whenever, from time to time, said Auditor and Register of the State Land Office, or either of them, shall be requested to do so by said Board of Levee Commissioners, or by the president thereof, etc. And when said conveyances are so recorded, the title to said lands, with possession thereof, shall from thenceforth vest absolutely in said Board of Levee Commissioners, its successors or grantees. * * * **Said Board of Levee Commissioners shall have the power and authority to sell, mortgage, pledge, or otherwise dispose of said lands, in such manner and at such times and for such prices as to said Board shall seem proper."**

Prior to the institution of the suit No. 694 brought by the Levee Board against the Land Company, a suit for the

recovery of the same lands was brought in the State Courts of Louisiana by the State of Louisiana against the Land Company. That case went on appeal to the Supreme Court of Louisiana, and is reported *State vs. Tensas Delta Land Company, Limited*, 126 La. 59. The decision of the Supreme Court of the State construes the act under which the Levee Board was created. It was there specifically held that the Levee Board could sue to recover the lands, but that the State could not. In the opinion of the Court, by Mr. Justice Provosty, it is said (pp. 71-73):

> "Most assuredly and beyond all question, **the Legislature has divested the State absolutely of all beneficial interest in said lands, and transferred same to the said Board of Levee Commissioners.** It is impossible to read the said Act 59 of 1886 hereinabove quoted, and come to any other conclusion.
>
> "The argument that the said Board is nothing more than a mere agency or instrumentality of the State, and that therefore the State may sue in every case where the said Board might sue, contains a manifest *non sequitur*. Every city, town, and parish of the State is a mere agency or instrumentality of the State; but no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the State, any cause of action which any of them might have.
>
> "The legislative control over corporations of the character of this Levee Board is much more complete than over municipal corporations proper and parishes—it made them, and can at any time abolish them, **so long as the obligations of their contracts are not thereby impaired**—but these corporations have their existence and exercise their functions by and under the Constitution and statutes of the State, and so long as these established laws remain in force **it is they which much regulate the property and**

other rights of said corporations and their modes of action, and the disposition of their property, and their rights to sue and to be sued. If one of these corporations has a right of action, **the proper functionary to enforce same is the governing body of the corporation, and not the Attorney General, or the State.** * * *

"We note, in conclusion, that the membership of this Levee Board can be changed at any time by the Governor without his having to assign any reason, and that therefore the Legislature has provided ample remedy for the protection of the people of the district who are the real parties in interest."

In the opinion denying application for rehearing in the same case, the Supreme Court of Louisiana says (p. 74):

"The Legislature vested the absolute title to the lands in controversy in the Board of Commissioners of the Tensas Levee District, with full power to sell the same on such terms as the Board might deem proper. The Legislature also vested in said Board full power to sue and be sued, and to stand in judgment, in all matters relating to their gestion and trust. The Board of Commissioners could have brought the present suit to annul the alleged fraudulent sale and recover the lands. The Governor of the State, with his power of appointing and removing members of Levee Boards, can compel them to bring such suits as he may deem proper in the interests of levee districts.

"The General Assembly has the power at any time to authorize the Attorney General to institute actions for the use and benefit of the taxpayers and people of any particular levee district. **But as the General Assembly has vested the power to sue and be sued in the Board of Commissioners of the Tensas Levee District, and has vested no such co-ordi-**

nate power in the Governor or Attorney General, we are of opinion that the institution of this suit in the name of the State is unauthorized."

The Attorney General claims that the State of Louisiana is affected by the result of this litigation; that indirectly it loses by an adverse decision or by a compromise which he does not approve; and that, therefore, the State has a right to be made a party to the suit and to be heard therein. If that claim is well founded, the State would have a right to interfere with every litigation in which a municipal corporation of the State is a party to the record, and likewise in every litigation the result of which might be said to affect the material prosperity of the State. If such were the case the control of the litigation confided by State statute to the municipal bodies of the State, might be taken from these municipal bodies and placed within the control of the Attorney General at the will of the latter. Such pretension is answered by the language of the Supreme Court of Louisiana in the quotation above made. It is clear, upon reason as well as authority, that the State has no different *status* in litigation than any other body.

In *New Orleans & Carrollton Railroad Co. vs. City of New Orleans*, 34 La. An. 429, 437, the State undertook to intervene upon a question of the right of a railroad to use the streets in New Orleans. The Court said:

> "What the plaintiff is really claiming is the right to operate its railroad through the streets of New Orleans for a period of twenty-five years from 1883; and the question to be determined is whether this valuable right has been conferred upon her by her charter, either expressly or by legal implication. Because, under a particular construction of legislative acts, the State would derive certain pecuniary ad-

> vantages furnishes, in our judgment, no reason why we should depart from those general rules which are universally applied in the exposition of statutes. The State is the fountain of justice, and **when mere rights of property are asserted in her favor, she subjects herself to the dominion of those laws which she has herself established as the proper standard by which similar rights, when claimed by her citizens, are regulated and determined.** Her dignity and justice require that when a question is presented to her courts as to the extent to which she has delegated a part of her sovereign power and conferred upon individuals peculiar privileges not shared by the rest of her children, such question should be determined without consideration of any more pecuniary advantage to the State. We at least shall determine this question precisely as if the reversion of property claimed under the statute had been stipulated in favor of any individual instead of the State."

The same principle is recognized and applied in a recent case in the Supreme Court of the United States, to which reference will later be made upon another point. We refer to *Ex Parte Leaf Tobacco Board of Trade of the City of New York*, 222 U. S. 578, 581. In a *per curiam* opinion denying mandamus to permit petitioner to intervene in a cause in the court below, it is said:

> "The merely general nature and character of the interest which the movers allege they have in the papers here filed is not in any event of such a character as to authorize them in this proceeding to assail the action of the court below. This is more obvious in this case since the act of the court which is assailed has been accepted by those who are parties to the record."

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The Attorney General refers to *Little vs. Williams*, 231 U. S. 335; *Chapman vs. Levee District*, 232 *Id.* 186, 198; and *Rogers Locomotive Mach. Works vs. American Emigrant Co.*, 164 *Id.* 559; but these cases are not at all in point in this discussion.

Little vs. Williams and *Chapman vs. Levee District* arose in Arkansas under the Swamp Land Act passed by Congress in 1850, and compromise was made in 1895 between the State of Arkansas and the United States, under which the State relinquished all rights in the land in question. This compromise was approved by the State Legislature in 1897, and by Congress in 1898. These two cases go merely to the extent of holding this compromise to be binding on the Levee District, a subordinate agency of the State. Clearly it was binding, for the compromise was the result of legislative enactment. It was within the legislative power to create or abolish the levee district, and take from it the title to the lands which it held. If the Legislature could abolish the levee district, clearly it could bind the district by its compromise made by legislative enactment.

But in the instant cause the Legislature of Louisiana did not choose so to act. It invested the Levee Board with full power of control and disposition of the lands, and it results that so long as that power remains unrevoked it is within the authority of the Levee Board to convey good title to the lands or compromise the litigation respecting the same.

The like observations apply to *Rogers Locomotive Mach. Works vs. American Emigrant Co.*, 164 U. S. 559, 576, 577. It is said on page 576:

> "The State made it [the county], and could, in its discretion, unmake it, and administer such property and revenue through other instrumentalities."

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We do not dispute this doctrine. In the suit at bar the State, through its legislative body, made the Levee Board and devolved upon it the duty to administer the property; but the Legislature of Louisiana has never unmade the Levee Board, nor sought to administer the lands through a different instrumentality. Certainly it does not lie within the scope of the duties of the Attorney General to unmake that body which the Legislature has created, nor destroy or take from its powers. It follows, as a logical consequence, that the acts of the Levee Board in the discharge of the duties thus expressly delegated to it by the State Legislature are valid and binding.

V.

The State of Louisiana Is Not a Party to the Record in the Court Below, Nor to the Decree of October 21, 1913, Dismissing the Cause, and Hence Is Not Entitled to Appeal From That Decree.

It is a familiar rule that one who is not a party to a record and judgment is not entitled to appeal therefrom.

Bayard vs. Lombard, 9 How. 530; *Ex Parte Cutting,* 94 U. S. 14; *Ex parte Cockroft,* 104 *Id.* 578; *Guion vs. Liverpool, London and Globe Ins. Co.,* 109 *Id.* 173; *Ex parte Leaf Tobacco Board of Trade,* 222 *Id.* 578, 581; *Cook vs. Lasher,* 73 Fed. 701, 704 (C. C. A.).

In the early case of *Bayard vs. Lombard, supra* (p. 551), it was said by the Supreme Court of the United States:

> "It is a well-settled maxim of the law, that 'no person can bring a writ of error to reverse a judgment who is not a party or privy to the record.'"

The most recent expression upon this subject in the Supreme Court of the United States reaffirms this rule. We refer to *Ex Parte Leaf Tobacco Board of Trade, supra,* where it is said:

> "One who is not a party to a record and judgment is not entitled to appeal therefrom."

But even a party to a suit cannot appeal from a decree therein rendered, if he is not thereby affected. As said by Chief Justice Waite in *Farmers' Loan and Trust Co. vs. Waterman,* 106 U. S. 265, 269:

> "Only parties to a decree can appeal. If a party to the suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree."

It results, therefore, that the State of Louisiana, being neither a party to the suit nor a party to the decree, cannot appeal from the decree dismissing the bill unless the mere fact that the application made April 6, 1914, by the Attorney General, for leave to intervene in behalf of the State, gives such right of appeal. It is plain that it does not. Indeed from what has already been said, it is clear that the State has no right to intervene or carry on the litigation.

VI.

No Appeal Lies From the Order Denying Leave to Intervene, and, Inasmuch as the Leave Was Denied and the State of Louisiana Never Became Party to the Cause, It Follows That No Appeal Lies From the Order Dismissing the Suit.

This case is to be disposed of upon well-settled principles. Not only was the State of Louisiana not a party to

the suit, but it did not apply to become such until nearly six months after the cause was dismissed out of the District Court, pursuant to the act of compromise. The application made by the Attorney General, in the name of the State, for leave to intervene, made on April 6, 1914, was addressed to the sound discretion of the District Court, and was denied by that court. No appeal lies from the order denying leave to intervene; and, inasmuch as the leave to intervene was denied, and the State of Louisiana never in fact became a party to the cause, it results, upon principles to which we have already adverted, that no appeal lies, at its instance, from the order made on October 21, 1913, dismissing the suit out of the District Court. The ruling of Judge Boarman upon this head is pointedly sustained by decisions of this Court and other Federal Courts.

Connor vs. Peugh's Lessee, 18 How. 394, 395; *Ex Parte Cutting*, 94 U. S. 14, 19-22; *Guion vs. Liverpool, London & Globe Insurance Co.*, 109 *Id.* 173; *Credits Commutation Co. vs. United States*, 177 *Id.* 311; *Ex Parte Leaf Tobacco Board of Trade*, 222 U. S. 578; *Blaffer vs. New Orleans Water Supply Co.* (C. C. A., 5th Circuit), 160 Fed. 389; *Fink vs. Bay Shore Terminal Co.* (C. C. A., 4th Circuit), 144 *Id.* 837, 838; *Land Title & Trust Co. vs. Asphalt Co. of America* (C. C. A., 3rd Circuit), 127 Fed. 1, 21, 22; *Credits Commutation Co. vs. United States* (C. C. A., 8th Circuit), 91 Fed. 570, 572-574; *In re Columbia Real Estate Co.* (C. C. A., 7th Circuit), 112 *Id.* 643; *Thomasson vs. Guaranty Trust Co.* (C. C. A., 7th Circuit), 159 Fed.

126; *Jones & Laughlin, Ltd., vs. Sands* (C. C. A., 2nd Circuit), 79 *Id.* 913; *Lewis vs. Baltimore & L. R. Co.* (C. C. A., 4th Circuit), 62 *Id.* 218; *Hamlin vs. Toledo, etc., Co.* (C. C. A., 6th Circuit), 78 *Id.* 664, 665.

The Act of Congress of March 3, 1891, Chapter 517 (U. S. Comp. Stat. 1901, p. 549), provides:

> "The Circuit Courts of Appeal established by this act shall exercise appellate jurisdiction to review, by appeal or by writ of error, **final decision** in the District Court and the existing Circuit Courts, in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

It is clear that the denial by Judge Boarman of the petition of the State of Louisiana, through its Attorney General, for leave to intervene, is not a final decision within the meaning of the Circuit Court of Appeals Act; and the authorities above cited control the disposition of the instant cause and render necessary the denial of the writ of mandamus now sought.

Connor vs. Peugh's Lessee, 18 How. 394, 395, was an action of ejectment brought in the Circuit Court. The tenant did not appear and have herself made defendant in place of the casual ejector, according to the exigency of the notice served; and at the October term, 1854, a judgment was entered against the casual ejector in the usual form. On June 5, 1855, the tenant in possession came into court for the first time and moved to set aside the judgment and execution issued thereon and to be allowed to defend the suit for reasons set forth in her affidavit. The Court refused to

grant the motion, whereupon the tenant in possession prayed an appeal. Mr. Justice Grier said:

> "The tenant in possession having neglected to appear and have herself made defendant and confess lease, entry and ouster, the judgment was properly entered against the casual ejector. No one but a party to a suit can bring a writ of error. The tenant having neglected to have herself made such cannot have a writ of error to the judgment against the casual ejector.
>
> **"The motion afterwards made** to have the judgment set aside and **for leave to intervene was an application to the sound discretion of the Court. To the action of the Court on such a motion no appeal lies,** nor is it the subject of a bill of exceptions or writ of error."

Ex Parte Cutting, 94 U. S. 14, 19-22, like the instant cause, was a petition for a writ of *mandamus* to the Circuit Court of the United States to compel that Court to allow an appeal from its decree. The opinion is by Chief Justice Waite, who says:

> "To entitle the petitioners to the writ asked for in this case, they must show that they have a clear right to an appeal which has been refused by the Circuit Court. The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has **a clear right to demand such a performance and who has no other adequate remedy.** It is never granted in anticipation of an omission of duty, but only after actual default.
>
> "This application is for a writ commanding the Judges of the Circuit Court, or one of them, to allow the petitioners an appeal from the decrees in the cause, and a *supersedeas*. This is the only specific re-

lief asked; and, in support of the application, it is insisted that Marie, Otis, Cutting, Jr., Cutting and Fearing were admitted as parties to the suit March 25th, when they filed their petition therefor, and that consequently they were in a position to demand an appeal as parties. * * *

"The persons presenting the petition of March 25th never did in fact become parties, and it is apparent from the record that their present claim in that regard is an afterthought. They filed their petition to be made defendants in the suit, but it was never granted. * * *

"From this it is apparent that **if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the Court to that effect, but his petition must be granted;** and while it is not necesary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party. That, as we have seen, is not the case here. * * *

"Upon this state of facts it is impossible to say that the petitioners, or any of them, have established their right to appeal as actual parties to the suit before the decree.

"No appeal lies from the order of October 3rd, refusing them leave to intervene and become parties; for that was only a motion in the cause, and not an independent suit in equity appealable here.

"Neither can these petitioners appeal as stockholders. **Only parties, or those who represent them, can appeal.** The stockholders do not represent the corporation, but for some purposes the corporation represents them. They are sometimes admitted as parties to a suit, for the purpose of protecting their own interest in the corporation against unfounded and illegal claims against it, but this 'remedy is an

> extreme one, and should be admitted by the Court with hesitation and caution.' (*Bronson vs. LaCrosse Railroad Co.*, 2 Wall. 302.) It is always addressed to the sound judicial discretion of the Court. That we cannot control by *mandamus*."

Guion vs. Liverpool, London & Globe Insurance Co., 109 U. S. 173. Guion, claiming to have an interest in certain railway bonds which were the subject of foreclosure, filed his petition in the foreclosure suit, asking to be admitted as a party to the suit for his own protection. This petition was denied and Guion was allowed an appeal on giving bond. The appeal was dismissed for want of jurisdiction. Chief Justice Waite, in the opinion of the Court, said:

> "The petition of Guion was for leave to appeal from a decree in a suit to which he was not a party. We decided in *Ex Parte Cutting*, 94 U. S. 14, that such an appeal could not be taken. He had applied for leave to become a party, but this leave was not given. So he is not a party to the decree from which he appealed."

The most recent expression of opinion by the Supreme Court of the United States upon this head is found in *Ex Parte Leaf Tobacco Board of Trade*, 222 U. S. 578. This was an application for leave to file a petition for mandamus, prohibition and writ of *certiorari*, in order to review the decree of the lower Court carrying into effect the decree of the Supreme Court of the United States in the suit *United States of America vs. American Tobacco Company*. The leave to file the petition was denied and the following reasons were assigned in the *per curiam opinion* (p. 581):

> "1. One who is not a party to a record and judgment is not entitled to appeal therefrom. (*Bay-*

ard vs. Lombard, 9 How. 530; *Indiana vs. Liverpool, London & Globe Ins. Co.*, 109 U. S. 168; *Ex Parte Cockroft*, 104 U. S. 578.)

"2. The action of the Court below in refusing to permit the movers to become parties to the record is not susceptible of being reviewed by this Court on appeal, or indirectly, under the circumstances here disclosed, by the writ of mandamus. (*In re Cutting*, 94 U. S. 15, and see *Credits Commutation Co. vs. United States*, 177 U. S. 311.)

"3. The merely general nature and character of the interest which the movers allege they have in the papers here filed is not in any event of such a character as to authorize them in this proceeding to assail the action of the Court below. This is more obvious in this case since the act of the Court which is assailed has been accepted by those who are parties to the record. (*United States vs. Union Pacific R. R. Co.*, 105 U. S. 262; *Elwell vs. Fosdick*, 134 U. S. 500.)"

The declared views of the Circuit Court of Appeals of the Fifth Circuit on this subject are in precise harmony with the decisions of the Supreme Court of the United States above cited. *Blaffer vs. New Orleans Water Supply Co.*, 160 Fed. 389, is a decision of that Court. It holds that order refusing to allow one to intervene is not an appealable order, being an exercise of discretion and not final in character; that he is left free to assert his rights in any other tribunal of competent jurisdiction, the order not being, in any sense, a determination of the merits of his claim. On page 391 it is said:

"The second ground of the motion to dismiss the appeal is based upon the fact that the intervenor failed to obtain an order permitting him to intervene

and thereby making himself a party to the suit, from which it follows that he is not in an attitude to appeal from the decree entered in the cause or from the refusal of the Court to permit him to intervene. **The action of the Court in declining to make an order allowing appellant to intervene was an exercise of purely discretionary power and was not final** in its character. Appellant failing to obtain the right to intervene was left free to assert such other rights as he might possess in any other tribunal of competent jurisdiction. The order of the Court was equivalent to a denial of the application of the appellant for leave to intervene, and should not be regarded in any sense as a determination of the merits of his claim. (*Credits Commutation Co. vs. United States*, 177 U. S. 311.) * * * In this case it affirmatively appears from the statement of the trial Judge that he declined to make any order upon intervenor's petition. That an appeal does not lie from the order of the Court below denying the motion in a pending suit to permit a person to intervene and become a party thereto is supported by the following authorities (citing many cases.)"

They there assume to quote from the decision of three Judges of the Eighth Circuit, in *United States vs. Northern Securities Co.*, 128 Fed. 808, as follows:

> "Nor will intervention lie after decree, unless to protect an interest which cannot otherwise be protected."

But counsel do not correctly quote either the paragraph or sentence as written by Circuit Judge Thayer in that case. What he said was this (p. 810):

> "**Applications for leave to intervene in a case after the entry of a final decree are very unusual.** They are never granted as a matter of course, and,

> **owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected,** or to avoid some complication that is liable to arise."

The rule of law thus declared is fatal to the intervention and appeal now sought. It is not necessary that this intervention be granted in order to preserve the rights of the State of Louisiana in the lands in question, if any such rights there be. The District Judge so returns. In paragraph 16 of his return he says:

> "I deny that petitioner's interests in the subject-matter of the aforesaid suit cannot be protected except by and through an appeal from the final decree ratifying said compromise and dismissing said suit. In my view the petitioner has no interest in the subject-matter of said suit, but if it had any, an independent suit would, without doubt, lie for the protection thereof."

This is not like the case of a fund in court of which division is about to be made, where all rights of the party applying for leave to intervene will be lost unless intervention be granted. In the suit at bar the lands are still existent; they stand of record in the name of the Land Company; and if the State of Louisiana has any rights therein, an independent suit lies in the name of the State to enforce those rights. The distinction upon which we rely is made clear in *Credits Commutation Co. vs. United States,* 177 U. S. 311. That case brought under review the action of the Circuit Court of Appeals of the Eighth Circuit in denying the petitions for leave to intervene in three certain litigations affecting the

Union Pacific Railway Company. One of the suits was for the appointment of receivers, the enforcement of certain liens and the administration of the properties. Another suit was a bill of complaint of the trustees of the first mortgage of the railway to foreclose that mortgage. The third suit was a bill by the United States to foreclose the subsidy lien of the United States upon the property of the Union Pacific Railway. The Credits Commutation Company and the Combination Bridge Company asked leave to intervene, and an order was made in the Circuit Court denying the prayers for leave to intervene. Appeal was taken to the Circuit Court of Appeals, and in that court motions were made by the appellees and granted to dismiss the appeal, and thereupon an appeal to the Supreme Court of the United States was allowed. In that court a motion was made to dismiss or affirm. In the opinion of Mr. Justice Shiras it is said (pp. 314-317):

> "To show that the Circuit Court, in denying the petition for leave to intervene, was not exercising the usual discretion of a chancellor in passing upon a petition of an outside party for leave to intervene, but adjudicated the petitioners' rights asserted in the petitions, as if upon demurrer thereto, we are pointed to the language used: 'Ordered, that the prayers of the petitioners for leave to intervene herein be, and the same are hereby denied, not as matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene.'
>
> "It is urged that the Circuit Court declined to treat the subject as of one of discretion, and elected to determine the legal rights of the petitioners, so as to preclude them from resorting thereafter to some other tribunal, and that, therefore, its judgment was a final one and properly reviewable on appeal.

"We cannot accept this view of the meaning and effect of the order in question. **What was sought in the petitions was leave to intervene in a pending and undetermined cause, and that right alone was determined. The very terms used by the Court, that the facts stated were 'not sufficient to show that the petitioners, or either of them, have a legal right to intervene,' shows that what was considered was the right to intervene. That right refused, the petitioners were left free to assert such other rights as they might possess as in any other tribunal.** * * *

"The question was well considered by the Circuit Court of Appeals, and we quote and adopt its statement, as follows:

" 'When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial Court. * * * It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an

appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. The cases at bar, however, are not of that character. The petitioners were under no obligation to intervene in the litigation against the Union Pacific Railway Company to preserve their alleged right to form a junction with the road of that company when they should have completed their own road to a suitable junction point. The question which they sought to litigate in the pending litigation, could, we think, with more propriety and with less difficulty, have been litigated by an independent bill after they had completed, or were about completing, their line to a suitable junction point. Prior to that time the questions which they sought to raise by means of the intervening petitions were speculative questions, which the lower Court, as we think, very properly, refused to consider or determine.' * * *

"As its action [the action of the Circuit Court] **in denying the petitions to intervene, was an exercise of purely discretionary power, and not final in its character** as respects such alleged right to connect, **we think the Circuit Court of Appeals was right in holding that the appeals could not be entertained by that Court,** and its dceree, dismissing the same, is accordingly affirmed."

The above case, as reported in the Circuit Court of Appeals of the Eighth Circuit, is *Credits Commutation Co. vs. United States,* 91 Fed. 570, 572-574.

In addition to the language quoted by the Supreme Court of the United States, it is said by the Circuit Court of Appeals:

"The motion to dismiss the several appeals is grounded on the proposition that the order from which the several appeals were taken was not a final judgment or decree from which an appeal will lie to

this Court, and upon the further proposition that the action of the lower Court in refusing leave to intervene is not reviewable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention. Both of these positions are, in our opinion, well taken. **The order denying leave to intervene was not 'final,' within any of the definitions usually given of a final order or decree, inasmuch as it did not dispose of the petitioners' alleged right** to form a junction with the main line of the Union Pacific Railroad, which was the substantial right asserted, **but left them at full liberty to litigate that question by an original bill, or by any other method of procedure which they saw fit to adopt.** The trial Court could not, and did not, finally adjudicate any of the questions which were presented by the intervening complaint, for the reason that it refused to give the petitioners a standing in court to be heard with respect to such question, and also refused to permit the intervening complaint to be filed and become a part of the record. None of the issues, therefore, which were tendered by the petitioners in their intervening complaint, ever passed under judicial review in such a manner as to estop the petitioners from tendering like issues on any future occasion, because the trial Court refused to allow such issues to be incorporated into the pending suits in such a form that they could be tried and determined. * * *

"It was suggested in argument that, as the lower Court saw fit to insert a clause in its order that it had not refused leave to intervene 'as a matter of discretion,' but because the petitioners had no legal right to intervene, therefore the motion to dismiss is not tenable, so far as it is based on the discretionary character of the order. The answer to this suggestion is that the trial Court, by inserting such a clause in its order explanatory thereof, could not give an

> effect to the order which was in any respect different from the effect which it had by virtue of the nature of the proceeding in which the order was made. The intervening petition merely invoked the discretionary power of the Court, and it could exercise no other power in the premises, whatever the purpose of the Court or its own declaration on the subject may have been. The fact is that the lower Court simply exercised its discretionary authority in denying leave to intervene, and it did not succeed in rendering a judgment upon the merits of the petitioners' claim which will conclude them in any subsequent suit, although it may have intended to do so. As it is now well settled, since the decision in *McLish vs. Roff*, 141 U. S. 661, that an appeal will only lie to this Court from orders or decrees which are final in their character, and which involve something more than the exercise of purely discretionary powers—except in some cases for which special provision is made by the seventh section of the act under which this Court was created (26 Stat. 826, c. 517)—it follows that the appeals cannot be entertained, and that the motions to dismiss the same must be sustained. It is so ordered."

If it be said that an independent suit will not lie, we say in reply that this is only because the State of Louisiana has no legal interest in the subject-matter in controversy. If the State has no legal interest in the subject-matter of this litigation, that is an objection which applies with equal force to its petition for leave to intervene. This is pointedly held in *Ex Parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581, to which we have called attention in Division IV of this brief.

It is said by petitioner that the proper practice is for the District Court to grant an appeal in every case, leaving the question of the appealability of the order for the de-

cision of the Court of Review. (See petition for mandamus, p. 20.) But it seems clear, upon reason as well as authority, that where no appeal lies the District Judge may refuse to allow it.

In re Durrant (C. C.), 84 Fed. 317; *Southern Building & Loan Association vs. Carey* (C. C.), 117 Fed. 325, 327.

It is idle to grant an appeal where, consistently with the recognized rules of law, the appellate court can do nothing but dismiss the appeal when perfected. And so it appears to have been an ordinary practice for the lower Court to deny an appeal if in the opinion of that Court the applicant is not entitled thereto, leaving him to apply for a review of the decision through the medium of petition for the writ of *mandamus*. This practice was pursued in the leading case, *Ex Parte Cutting*, 94 U. S. 14, 19-22, to which reference is above made, and in *Fink vs. Bay Shore Terminal Co.* (C. C. A., 4th Circuit), 144 Fed. 837, 838.

VII.

The Levee Board Acted in Unquestioned Good Faith in Entering Into the Compromise of July 11, 1913; and, Inasmuch as the Public Interests in These Lands Were Confided by Law to That Body, It Is Clearly Within the Discretion of the Trial Court to Deny to All Others the Right To Intervene and Appeal.

The petition for leave to intervene and appeal proceeds, apparently, upon the ground that the Levee Board has failed in its duty in that it has seen fit to compromise the litigation, whereas in the opinion of the Honorable Attorney

General the same ought to have been prosecuted to final conclusion. But the good faith of the Levee Board in entering into the compromise of July 11, 1913, is not questioned. This is shown affirmatively in the return of the District Judge, as well as by the entire absence from the record of any claim which reflects upon the honesty or good faith of the Levee Board. Neither in the objections of the Attorney General to the dismissal of the suit, nor in the petition for leave to intervene and appeal, nor elsewhere in the record, is it claimed that the Levee Board acted otherwise than in the most perfect goood faith and in the exercise of the best judgment of its members in entering into the act of compromise.

In paragraph 19 of the return of the District Judge it is said:

> "In the exercise of its best judgment, and with much apparent deliberation, the Levee Board has seen fit to compromise the existing suit, and in my opinion it had full power and authority so to do. That the Levee Board in entering into the compromise acted in the utmost good faith, and as it deemed for the interest of the taxpayers and inhabitants of the Levee District, was not questioned in any showing made by the Honorable Attorney General before me."

In paragraph 26 of the return the District Judge says:

> "It does not appear from anything shown in the court below that the compromise was in any respect against the best interests of the Levee District, nor that the Levee Board was wrong in its conclusion that the act of compromise, carrying with it the payment of $100,000, was fitly to be preferred to the hope of gaining, balanced by the fear of losing, in said litigation. From the act of compromise it appears that on a former occasion—*viz.*, on or about

> the 9th day of July, 1903—an act of compromise with reference to the lands mentioned in the bill of complaint had been entered into by said Levee Board, acting through its president, W. H. Holloman, under authority of resolution of said board, dated the 9th day of July, 1903, with the Tensas Delta Land Company, Limited, and such former act of compromise was, by the act of compromise of date July 11, 1913, ratified and confirmed. Under all the facts appearing in the record it might well be deemed by the members of said Levee Board to be a prudent act, in the interest of their constituents, to enter into the compromise aforesaid, and thereby acquire for the Levee District the benefits thereof, and it has at no time been claimed before me by the Honorable Attorney General, or by anybody else, that said members of the Levee Board acted otherwise than in the utmost good faith in the compromise so made by them."

Under these circumstances, it was clearly within the discretion of the trial Judge to deny to the State of Louisiana leave to intervene and appeal, especially when application for such leave was not made until nearly six months after the final decree of dismissal.

> *Land Title & Trust Co. vs. Asphalt Co. of America* (C. C. A.), 127 Fed. 1, 21, 22; *Fink vs. Bay Shore Terminal Co.* (C. C. A.), 144 Fed. 837, 838; *Thomasson vs. Guaranty Real Estate Co.* (C. C. A.), 159 Fed. 126.

In *Land Title & Trust Co. vs. Asphalt Co. of America*, 127 Fed. 1, 21, 22 (C. C. A., 3rd Circuit), it is said by Circuit Judge Gray:

> "The application to intervene, in both the first and third appeals, was broadly upon the ground that the party by whom the interests of the intervenor should be represented [in the one case the Land Title

and Trust Company, trustee, and in the other the receivers], was not representing such interests properly. No individual or separate interest of the petitioner, which could not otherwise be adjusted at all, and would therefore be lost if intervention were denied, was presented in the court below in either of the petitions which are the subjects of the first and third appeals. **If the trustee and the receivers act honestly and in good faith, the rights of the appellant are protected.** The trustee has important interests committed to him by his *cestuis que trustent* in the litigation before the Court, and the Court was right, both as to the trustee and the receivers, in exercising its discretion to protect them from interference, in the carrying on of the litigation and the administration of the funds in hand, as attempted by appellant's petitions for intervention. **If the trustee had acted in bad faith, or fraudulently, it was open to the appellant to proceed by original bill,** and if the receivers have been guilty of malfeasance in office, the proper remedy is an application to the Court below by the appellant or other party in interest, for their removal and the substitution of others."

In *Fink vs. Bay Shore Terminal Co.* (C. C. A., 4th Circuit), 144 Fed. 837, 838, application was made by *mandamus* to compel the Court below to permit a bondholder to intervene and appeal. In the opinion of Circuit Judge Goff it is said:

"No special cause was assigned by him, as a reason why such permission should be granted, save only that his rights were not fully protected by the decree of which he complained. No fraud is charged against the trustee, no collusion between the trustee and other bondholders, or other parties, is alleged, and no cause is shown by petitioner from which the Court could find that the refusal of the trustee to appeal from said decree was not entirely proper and

justified by the interests represented by it. Under these circumstances the Circuit Court, exercising its judicial discretion, refused the request of petitioner, and declined to permit him to become a party to said cause.

"It was not the positive duty of the Court below to permit the petitioner to become a party to said cause. That Court has not declined to discharge any duty imposed upon it, so far as the petitioner is concerned, but it has held that **as he is already represented in said litigation by the party duly selected for that purpose—the trustee in the mortgage, it would not be proper under the rules of procedure applicable to such matters, to permit him individually to intervene, and antagonize the trustee** in the discharge of his common duty to all the bondholders. No appeal lies from such discretionary action of the court below. To hold otherwise would create inextricable confusion in judicial proceedings, and render it almost impossible to terminate litigation of the character involved in this cause. Petitioner not having been made a party, was not entitled to an appeal from the decree complained of, and, not being so entitled, the writ of mandamus must not issue compelling the Court below to grant him an appeal."

In *Elwell vs. Fosdick,* 134 U. S. 500, a holder of $14,000 out of $955,000 of railroad bonds, secured by mortgage, was permitted by the Circuit Court to appeal to the Supreme Court in the name of the trustee in the mortgage, from a decree which it was claimed affected the interest of such holder. It appearing that some time before the appeal was taken the trustee had executed a release of his right to appeal and of errors in the decree, and that the Court had in the decree found that there was no proof showing that the trustee had not acted in good faith, it was held that the release bound all the bondholders represented by the trustee;

that the appeal was the appeal of the trustee; and that, on motion of the appellee, it must be dismissed.

In the petition for *mandamus* (p. 24) counsel quote an excerpt from the opinion of the Supreme Court of Louisiana in *State vs. Tensas Delta Land Company, Limited*, 126 La. 59, 72, as follows:

> "If the governing body of one of these corporations fails in its duty to bring a suit which clearly it ought to bring, the Courts may—only, however, under highly exceptional circumstances—allow any citizen or taxpayer of a district to bring the suit; and in such a case the same privilege might for the same reason be extended to the State. But nothing of that kind is pretended in this case. There is no suggestion that the Board of Commissioners of the District has failed to bring suit, or is unwilling to do so. In fact, this Court knows the contrary from the public prints."

The passage thus quoted, it is evident, has reference to a case where the Levee Board, acting fraudulently and collusively, omits to bring suit to redress a wrong sustained by it. So considered, it is in precise harmony with the decisions of the Federal Courts, to which attention is above called. In such case—or as the State Supreme Court expresses it, **"only, however, under highly exceptional circumstances"** —a citizen or taxpayer may bring suit; and it is suggested that perhaps the State may do so. But clearly the suit at bar does not present such a case. The Levee Board has not fraudulently or collusively refused or omitted to act. It has in fact acted. In the exercise of its best judgment and with the utmost deliberation and good faith, the Levee Board compromised the pending suit.

Land Title & Trust Co. vs. Asphalt Company of America, supra, and the other cases herein cited, are authority to the following effect:

FIRST. If the Levee Board acted honestly and in good faith in entering into the act of compromise, the public is fully protected, and no right of intervention in others exists.

SECOND. If the Levee Board acted in bad faith or fraudulently in entering into the act of compromise, it is open to one who is injured thereby to proceed by original bill, and hence he is not entitled to insist upon the right to intervene.

Board of Liquidation of the City Debt of New Orleans vs. Louisville & Nashville Railway Co., 109 U. S. 221, is also a case to the point that the compromise between the Levee Board and the Land Company will not be disregarded in this court. There a question arose on the presentation of an order by the authorities of the City of New Orleans to dismiss a suit in the Supreme Court of the United States, in which the city was plaintiff in error. The order was based on a compromise between those authorities and the railroad company, which the Board of Liquidation, intervening in the Supreme Court, alleged to be **without authority and fraudulent,** the Board of Liquidation itself claiming the land in controversy and that the city had no power, by its compromise, to dispose of the same. The Supreme Court did not disregard the compromise or the order of the city to dismiss the case, but thought the dispute as to the authority of the Mayor and Council presented questions too important to be settled summarily on motion, and ordered the motion to be continued to a subsequent term of the Supreme Court, when the appeal would be dismissed, in accordance with the stipulation, unless the Board should begin and prosecute without unnecessary delay in some court of competent jurisdiction an appropriate suit to set aside the compromise. Such independent suit was thereupon begun, and when the

same was decided in favor of the action of the Mayor and Council, the suit was dismissed in the Supreme Court on the basis of the compromise order.

The above case points out the only course which it is within the province of the State of Louisiana to pursue—if, indeed, it is entitled to pursue any legal remedy whatsoever—because of the alleged grievances set forth in the petition. This Court assuredly will not, upon motion or application for writ of mandamus to review the denial of motion in the court below, disregard the act of compromise. If the State of Louisiana desires to attack the compromise in an effort to set aside the same, such attack can be sustained, if at all, only in case it charges and proves that the act of compromise was fraudulently and collusively made between the Levee Board and the Land Company, and that serious injury has thereby resulted to the State. It is possible that a taxpayer of the Levee District might be able to maintain a suit upon such theory; but as the good faith of the Levee Board stands out in bold relief upon this record, there is no room for the application of this theory in the instant cause.

VIII.

The Circumstances That During the Pendency of the Suit Brought by the Levee Board, the Attorney General Was Solicitor or Counsel of Record For That Body, Does Not Give Him the Right to Appeal the Cause or Carry On the Litigation Contrary to the Will of His Client, the Levee Board.

When the motion was made by the Land Company in the court below to dismiss the cause, the Attorney General

made written objection thereto. These were not presented in behalf of the State, but were the objections of "R. G. Pleasant, Attorney General, State of Louisiana, and Attorney of Record for complainant."

Subsequently, when application was made for leave to intervene and appeal, it was made by the Attorney General in the name and ostensibly in behalf of the State of Louisiana. No authority, however, to make such application is shown, save such as may be inferred from the fact that Mr. Pleasant fills the office of Attorney General or appeared as solicitor or counsel for the Levee Board in its suit.

Whether the objections to the settlement of the suit be treated as objections of the State of Louisiana or the objections of the solicitor or counsel for the Levee Board, they are equally futile. By the act of compromise the suit was settled. There is no subsisting cause of action in favor of the Levee Board against the Land Company. Hence, it is not within the power of the Attorney General to carry on the litigation, and no right of appeal exists.

San Mateo County vs. Southern Pacific Railway Co., 116 U. S. 138, was a suit by the county against the railroad company to recover taxes. Judgment was rendered upon demurrer in favor of the defendant, and the suit dismissed. Thereupon a writ of error was sued out to review the case in the Supreme Court. After the suit was docketed in the Supreme Court, the railroad company paid into the treasury of the county the entire sum claimed by the county to be due. Notwithstanding the settlement between the parties, the attorneys of record for the county proceeded to carry on the suit. This was for the apparent reason that the suit was a test case upon the decision of which other causes depended. The Court entertained a motion to dismiss the writ of error made by counsel specially appointed by the Board of Super-

visors of the county for that purpose. Upon the suggestion that counsel of record desired to oppose the motion, an order was made that notice be given to them to appear and show cause against it if they desired to do so. But the motion being heard, the writ of error was dismissed in the Supreme Court. The ground of dismissal is said by the Supreme Court to be:

> **"For the reason that there is no longer an existing cause of action in favor of the county against the railroad company."**

There is no longer a dispute between the parties to the suit in the District Court. By the act of compromise of July 11, 1913, that dispute has been ended, and the conveyances made November 9, 1898, by the Levee Board to the Land Company have been ratified and confirmed.

If *mandamus* should be granted and the cause heard in this court on appeal from the decree made by Judge Boarman dismissing the suit, it would be impossible for this Court on the record thus made up to grant any relief against the express act of the Levee Board ratifying the sale and consenting to the dismissal of the suit. No relief could be granted against the act of the Levee Board in ratifying the sale and consenting to the dismissal of the cause unless fraud in the compromise were shown, and, as we have seen, there is not even a pretense that the Levee Board, in making that compromise, acted in bad faith.

Upon the record as it now stands the case as presented by the Honorable Attorney General to this Court is a moot case, involving no real issue or controversy between the parties litigant. The rule in such case is that no appeal will

be allowed, or, if appeal be taken, it will be dismissed in the appellate court.

Little vs. Bowers, 134 U. S. 547; *California vs. San Pablo, etc., Railroad Co.,* 149 *Id.* 308; *Mills vs. Green,* 159 *Id.* 651, 653, 657, 658; *New Orleans Flour Inspector vs. Glover,* 160 *Id.* 170; *Kimball vs. Kimball,* 174 *Id.* 158, 161; *American Book Co. vs. Kansas,* 193 *Id.* 49; *Jones vs. Montague,* 194 *Id.* 147; *Fisher vs. Baker,* 203 *Id.* 174; *Lewis vs. Wyman* (C. C.), 168 Fed. 756, 758, 759.

In *Little vs. Bowers,* 134 U. S. 547, 557, it is said:

> "It is well settled that when there is no actual controversy involving real and substantial rights **between the parties to the record,** the case will be dismissed."

In *California vs. San Pablo, etc., Railroad Co.,* 149 U. S. 308, while a writ of error was pending to reverse a judgment for the defendant in an action by the State to recover sums of money for taxes, the defendant offered to the plaintiff and deposited in a bank to its credit the amount of those sums with penalties, interest and costs. This by the statute of the State had the same effect as actual payments and receipt of the money. This fact as to the tender and deposit was admitted by the Attorney General in his brief. Mr. Justice Gray, in the opinion of the Court, said (pp. 313, 314):

> "Upon the fact most properly and frankly admitted in open court by the Attorney General of the State of California, there can be no doubt that this writ of error must be dismissed because the cause of

action has ceased to exist. Any obligation of the defendant to pay to the State the sums sued for in this case, together with interest, penalties and costs, has been extinguished by the offer to pay all these sums and the deposit of the money in a bank which, by a statute of the State, have the same effect as actual payment and receipt of the money. And the State has obtained everything that it could recover in this case by a judgment in this court in its favor. The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When in determining such rights it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the Court is now empowered to decide moot questions or abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the Court or in any other case, can enlarge the power or affect the duty of the Court in this regard."

In the later cases in the Supreme Court of the United States to which we have referred above, there is quoted with approval the rule as declared by Mr. Justice Gray in *Mills vs. Green*, 159 U. S. 651, 653:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal

> from the judgment of a lower Court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact when not appearing on the record, may be proved by extrinsic evidence."

Reliance is had by the Attorney General in his petition upon Act No. 3 of the Extra Session of the Legislature for the year 1910. This act makes it the duty of the Attorney General of the State of Louisiana, upon request of the Governor, to represent any political agency or subdivision of the State in any suit in any court, involving title to any land or real property belonging to any such political agency. The act reads as follows:

> "That it is hereby made the duty of the Attorney General of the State, upon the request of the Governor to represent the State or any political agency or subdivision thereof, in any suit in any court involving title to any land or real property belonging to the State of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of any of its political agencies or subdivisions."

The above act, it will be noted, merely gives the Attorney General, upon request of the Governor, power to act as counsel for the State, or any subdivision of the State, in land litigations. Whatever power the Attorney General has, he derives from some statute of the State.

Railroad Tax Cases (C. C.), 136 Fed. 233.

As was said in *State of Louisiana vs. Graham*, 25 La. Ann. 434:

> "The Attorney General is not the State, but only the counsel for the State. His agreement to acquiesce in a judgment is not the acquiescence of the State; nor does it bind a succeeding Attorney General not to take an appeal where he believes it to the interest of the State to do so and the time for appealing has not elapsed."

This proposed intervention is in form the intervention of the State of Louisiana. In reality it is the intervention of the Attorney General, for that officer assumes to take this action upon his own motion, and not by the direction of any higher State authority. If the Attorney General can continue this litigation against the will of the Levee Board, it logically follows that the ultimate power of disposition of the lands rests in him, not in the Levee Board, for to continue the suit is to rescind the act of compromise into which the Levee Board has entered.

By his act in seeking to continue the litigation, the Attorney General therefore arrogates to himself the ultimate authority over these lands, an authority which it has been solemnly adjudged by the Supreme Court of Louisiana the State itself does not possess. If these pretensions be the law, then truly the servant is greater than the master.

This contention, however, finds no support in judicial precedent.

In *Smith vs. Vicksburg, S. & P. Ry. Co.*, 112 La. 985, a compromise was entered into between plaintiff and defendant and the attorneys of the plaintiff attacked the compromise on the ground that it was made in bad faith and by collusion. The Court said:

"Defendant is to be considered as any other third person not prohibited by law from entering into a compromise with its creditors. The moral side of the question is not before us, nor the consideration of that which a careful business man, anxious to see that every one receive his own, would have done under similar circumstances. But this does not create a legal tie between the attorneys here and the defendant company. * * *

" 'We know of no law giving an attorney at law a privilege on a judgment not yet in existence, and no law to compel a party to prosecute a suit to a judgment in order that the attorney in the suit may obtain and enforce a privilege on the said judgment for his professional services. The plaintiffs having compromised their suit against the defendants (which they had a right to do) and demanded its dismissal, it was at an end, and there is no suit in which an intervention can be maintained.' "

Citing *Rind vs. Hunsicker,* 24 La. Ann. 572.

It will be borne in mind that after the act of compromise was made, and under date of July 19, 1913, the secretary of the Levee Board, by order of that body, wrote to the Attorney General instructing him, as attorney representing the Board, to dismiss the suit of *Board of Levee Commissioners of the Tensas Basin Levee District vs. Tensas Delta Land Company, Limited,* No. 694 on the docket of the United States District Court for the Western District of Louisiana, at the cost of plaintiff. (See letter in transcript.) The question presented is, therefore, analogous to that presented in *Ikerd vs. Borland,* 35 La. Ann. 337, 338, where it is said by the Court:

"The right here asserted is not merely to resist the dismissal of an appeal taken by the client, but actually to take an appeal by giving bond in the name of his client against the latter's will and orders."

The Supreme Court of Louisiana did not uphold the right thus asserted, but declared that an attorney-at-law who has been discharged by his client cannot, against the will and orders of the latter, give bond and prosecute an appeal in his name, and that an appeal so taken will be dismissed on motion of the client.

In the later case, *Voelkel vs. Succession of Aurich,* 118 La. 526, it is held that where an attorney for a litigant moves, as such attorney, for an appeal from a judgment against his client, and it is not pretended that the attorney personally has any appealable interest, the appeal will be dismissed, as the Court is obliged to notice, of its own motion, the absence of the proper parties, since it has no authority to adjudicate the rights of persons who are not before it, or of persons who have no rights before it. The converse of this proposition is recognized in *Keoughan vs. Oil Co.,* 116 La. 773, where it is held that after a judgment an attorney-at-law, under the general authority from his client to act in the case, is without authority to make a gratuitous waiver of appeal.

If an appeal lies from the decree entered by Judge Boarman dismissing the bill, that appeal, under the foregoing authorities, lies at the instance of the Levee Board, and no one else. It is evident, however, that the Levee Board is not entitled to appeal, inasmuch as the decree was entered with its consent. No appeal having been taken by the Levee Board, in no event will counsel be heard in its behalf in the Appellate Court. This principle is recognized in *Fitchie vs. Brown,* 211 U. S. 321, 328, 329. In that case executors were parties to the action, but did not appeal. Counsel for the executors claimed the right, however, to

be heard in the Supreme Court. Mr. Justice Peckham, in the opinion of the Court, said:

> "The counsel for the executors of the testator, appellees herein, was permitted in this court to file a brief and was heard orally on the argument before us, although no appeal from the decree had been taken by the executors. This Court stating, however, that it would thereafter decide whether counsel for executors had any right to be heard to contend against the decree of the Court below. * * *
>
> "We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients."

IX.

The Law Favors Compromise of Disputed Claims and the Civil Code of Louisiana Makes Express Provision Therefor.

Divers claims of the respective parties were in dispute between them in the court below. The Levee Board filed its bill seeking to rescind the sale to the Land Company, made November 9, 1898, setting up, as grounds therefor, fraud in the sale, disguised donation and lesion. The Land Company denied all charges thus made and insisted upon the validity of the sale.

While the cause was pending for trial on the merits, the parties to the suit saw fit to compromise the same. In thus entering into the act of compromise, they dealt with each other on terms of equality. They held no relation of trust or confidence one to the other. Each had knowledge, or the opportunity to acquire knowledge, of every fact bearing upon the validity of their respective claims. A compromise made under such circumstances is within the power

of the parties and favored by the Courts and invariably upheld by them.

Hennessy vs. Bacon, 137 U. S. 78; *Cleveland vs. Richardson*, 132 U. S. 318, 329; *Hager vs. Thompson*, 1 Black 80; *Chicago & Northwestern Railway Co. vs. Wilcox* (C. C. A.), 116 Fed. 913, 914.

In *Hennessy vs. Bacon*, 137 U. S. 78, 85, in the opinion of the Court, by Mr. Justice Harlan, it is said:

> "It is the case of the compromise of a disputed claim, the parties dealing with each other upon terms of perfect equality, holding no relation of trust or confidence to each other, and each having knowledge, or having the opportunity to acquire knowledge, of every fact bearing upon the question of the validity of their respective claims. (*Cleveland vs. Richardson*, 132 U. S. 318, 329.) Such a settlement ought not to be overthrown, even if the Court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained."

The rule is thus stated by Circuit Judge Sanborn in the opinion of the Circuit Court of Appeals of the Eighth Circuit, in *Chicago & Northwestern Railway Co. vs. Wilcox*, 116 Fed. 913, 914:

> "The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims. It loves peace, hates broils and dissensions and discourages the prolongation of litigation and the revival of controversies which have once been closed. The judgment of a Court settles the claims submitted to it and estops the parties from

> again litigating them after they have been adjudicated. In the absence of fraud or mistake, an executed agreement of settlement of an unlinquidated or disputed claim constitutes as conclusive and as effectual an estoppel against the parties to the compromise from again litigating the claim thus settled as the final judgment of a Court of competent jurisdiction to the effect that the rights of the parties are as they are set forth in the agreement, and such a contract is always upheld by the Courts."

The Civil Code of Louisiana defines a transaction or compromise and makes specific provision for ending lawsuits by the execution of such instruments as that now before the court.

Article 3071 of the Civil Code reads:

> "A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.
>
> "This contract must be reduced into writing."

Thus it is seen there are three elements which go to make up a transaction or compromise: There must be differences between two or more persons in respect of which a lawsuit is contemplated or exists or may be brought; the parties must agree upon the terms of adjusting such differences; the contract must be reduced to writing. The document presented to the Court below, constituting the act of compromise of July 11, 1913, is correct in form, and embraces every element which goes to make up a transaction or compromise within the above definition of the Louisiana Civil Code.

Litigation was pending between the parties. They agreed, after thorough discussion, to adjust their differences. They reached an amicable agreement which each was willing to accept and preferred to the hope of gaining, balanced by the danger of losing. Complainant was willing to accept $100,000 and ratify and confirm defendant's title to the property in controversy. Defendant was willing to give the $100,000 and have its title ratified and confirmed. The contract of compromise was reduced to writing and executed before a Notary, with two witnesses.

Who, then, has the right to enter into a contract of compromise, or make a transaction of this character? Article 3072 of the Civil Code of Louisiana reads as follows:

> "A man to transact must have the capacity to dispose of the things included in the transaction."

Some of the powers vested by statute in the Levee Board have already been noted in Division IV of this argument. We have there seen that the title to the lands was vested by the State of Louisiana in the Levee Board; that there was likewise conferred upon the Levee Board the power to alienate without limit; and that the Levee Board was also invested with the authority to sue and be sued in its corporate name.

The power to alienate the lands without limit necessarily involves the power to compromise a pending suit respecting the lands. The case is brought within the direct terms of Article 3072 of the Civil Code, which declares that a person, in order to transact must have the capacity to dispose of the things included in the transaction.

Again, as we have seen, Section 3 of Act 59 of the Laws of 1886, creating the Levee Board and defining its powers, expressly invests it with power to sue, and this

necessarily implies the power to compromise and end the suit begun. We venture to say that the power to begin and conduct a suit, without the power to end it, never yet was conferred upon a corporate body.

The Civil Code declares what may be embraced within the terms of a transaction or compromise. Article 3073 reads:

> "Transactions regulate only the differences which appear clearly to be comprehended in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them.
>
> "The renunciation, which is made therein to all rights, claims and pretensions, extends only to what relates to the differences on which the transaction arises."

This article, it will be perceived, provides for special compromises wherein the parties adjust particular differences that exist between them as contra-distinguished from general compromises provided for by Article 3083 of the Code, wherein parties compromise generally on all differences which they may have had with one another, the titles which they then know nothing of and which are afterwards discovered, etc.

In the particular instance submitted to the Court below, the compromise comes within the terms of Article 3073 above quoted, and is intended to, and does, clearly adjust and settle, as therein stated, all the differences existing between the parties as set forth in the bill of complaint and amended bills of complaint filed in the suit, and forever sets at rest all questions relating to the validity of

the titles of the Tensas Delta Land Company, Limited, to the lands situate in the eight parishes mentioned in the bill.

Article 3078 of the Civil Code declares the effect of such a compromise. It reads:

> "Transactions (compromises) have, between the interested parties, a force equal to the authority of things adjudged. They cannot be attacked on account of any error in law or any lesion. But an error in calculation may always be corrected."

The term "thing adjudged" is defined by the Civil Code of Louisiana, Article 3556, paragraph 31, as follows:

> "Thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal."

The Civil Code makes provision for the rescission of a transaction or compromise, but it may not be done in the manner attempted by the Attorney General in the instant cause. Article 3079 reads:

> "A transaction may be rescinded notwithstanding, whenever there exists an error in the person or on the matter in dispute. It may likewise be rescinded in the cases where there exists fraud or violence."

Nowhere in the record in the suit at bar is it claimed or intimated that there exists an error on the matter in dispute, or that there exists any fraud or violence in the consummation of the transaction. In such case only would there exist a reason in law for setting aside the transaction

or compromise, and then it could be done only at the instance of one of the parties thereto, or someone having a legal interest therein.

X.

The Fact That the Bill of Complaint Charges Fraud in the Sale Made by the Levee Board on November 9, 1898, Does Not Take Away the Right of the Levee Board to Compromise the Suit.

In its bill of complaint and amended bills of complaint the Levee Board sought to avoid the sale made to the Land Company on November 9, 1898, charging fraud in the sale, disguised donation and lesion. The objections of the Attorney General to the dismissal of the suit, and likewise his petition for leave to intervene and appeal, assume that there was in fact fraud in the sale made by the Levee Board in the year 1898, and from this it is argued that the parties ought not to be permitted to compromise a fraud. No such facts were shown before the District Judge. On the contrary, it appears from the record that all charges of fraud or wrongdoing were denied by defendant Land Company under oath in an answer filed in support of the demurrer, which answer appears on pages 54 to 68, inclusive, of the printed record in cause No. 2446, and was verified by the Honorable F. G. Hudson, late of Monroe, La., now deceased, who was then acting as the duly appointed legal agent of the Land Company.

It thus appears that fraud in the sale was charged by complainant and denied under oath by defendant; and it is gravely argued by the Attorney General that, fraud being charged, the compromise cannot stand, for the reason that it is against public policy to allow the compromise of a

fraud. If the mere fact that fraud is charged, although not proved, prevents the compromise of suit, it results that a large proportion of the suits begun in our various courts, State and Federal, are placed beyond the possibility of compromise by mutual agreement of the parties, because nothing is more common in litigation than for a party, conceiving himself to be aggrieved, to charge fraud against his adversary.

The Attorney General assumes in his objections and petitions to declare in what the public policy of Louisiana consists. But, as said by the Supreme Court of the United States in the *Girard will* case, the public policy of a State is to be found in its Constitution, laws and judicial decisions, and we are not to look beyond those to general considerations of supposed public interests. It is added by Mr. Justice Story, in the opinion of the Court:

> "The question what is the public policy of a State and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty and to involve discussions which scarcely come within the range of judicial duties and functions and upon which men may and will complexionally differ."
>
> *Vidal vs. Girard's Executors,* 2 How. 127, 197, 198.

Confining, then, the consideration of this question of public policy to what is found in the Constitution, statutes or judicial decisions of Louisiana, it will be seen that the contention that this compromise is against the public policy of the State is wholly destitute of foundation. We are aware of nothing in the Constitution, statutes or judicial decisions of Louisiana which takes from the Levee Board

and places in the Attorney General the ultimate power of disposition of these lands. On the contrary, the statutes of Louisiana expressly vest in the Levee Board the title to these lands, the power without limit to alienate the same, and the power to sue in respect thereto.

Moreover, the Civil Code of Louisiana expressly contemplates that a transaction or compromise may embrace and settle differences between the parties, even though fraud is charged. Article 3080 is as follows:

> "A transaction may also be rescinded, when it has been made in execution of a title which is null, unless the parties have expressly compromised on the nullity."

This is a negative pregnant and intends the affirmative. A common instance of a title which is null is the case where the title is based on fraud. The clear intendment of this article is that, if the nullity charged or existing grows out of fraud, and with full knowledge and appreciation thereof, the parties expressly compromise on the nullity, the transaction or compromise is effective in law in like manner as if made in respect of any other matter of difference.

In *Russ vs. Union Oil Co.*, 113 La. 196, 205, it is said:

> "There is no rule of law, morals or ethics which denies to the ordinary citizen the right to compromise, with a person asserting it, a claim against him for damages; * * * and, when the compromise is effected in the manner provided by law, it has the force of the thing adjudged and cannot be attacked collaterally, or for error of law or lesion, in a direct action."

Again in *Turregano vs. Barnett*, 127 La. 620, it is said:

> "A settlement of business transactions where, with full knowledge of all material facts, money is accepted and a receipt in full given, will not be disturbed, in the absence of allegation and proof of error or fraud."

The Louisiana case most nearly parallel to the case at bar is *State vs. Hackley, Hume & Joyce*, 119 La. 482. Suit was brought by the State of Louisiana against Hackley, Hume & Joyce to recover lands in Tangipahoa Parish. It was charged that the lands had been fraudulently entered and patents therefor from the State fraudulently procured. The District Attorney was authorized by the Governor to bring suit, and brought the same accordingly. Subsequently a tentative compromise was entered into between Hackley, Hume & Joyce and the Governor, wherein it was proposed amicably to adjust the issues in suit and settle by compromise the title to the lands in consideration of the payment to the State of the sum of $27,447.12. This proposition it was proposed to submit to the General Assembly at its session of 1908. The District Attorney refused to stay proceedings in the suit at the request of the Governor, for reasons sufficient unto himself. Whereupon the Governor requested the Attorney General to file a motion to stay the proceedings until the Legislature might have opportunity to pass upon the proposed compromise. This motion was made and granted by the trial Court, and thereupon the District Attorney applied to the Supreme Court for writs of *certiorari* and *mandamus*, insisting upon his authority to continue in the prosecution of the suit brought by him in the name of the State, notwithstanding the stay obtained by

the Attorney General. The Supreme Court denied the writ of *mandamus* asked, saying:

> "The General Assembly should be given the opportunity to consider questions that here arise in regard to these lands. They doubtless will settle upon such action as will protect the State."

In the instant cause the Levee Board possessed the same power over the lands in controversy, and the right to compromise a suit respecting the same, as was possessed by the State of Louisiana in respect to the lands involved in the Hackley, Hume & Joyce suit, and if it was proper for the General Assembly to compromise the cause reported in the 119th Louisiana, notwithstanding fraud in the acquisition of the lands was claimed, it was clearly within the power of the Levee Board to compromise the issues involved in the suit at bar.

In *Antoine vs. Smith,* 40 La. An. 560, suit was brought for the recovery from the defendant of two hundred shares of the capital stock of the Louisiana State Lottery Company. Plaintiff had become possessed of these shares, but being "engaged in politics," the circumstances that he held the shares was concealed by causing them to be placed in the name of another. The cause of the contract and the motive of the transfer were intrinsically illegal and opposed to good morals and public policy, and with reference thereto the Supreme Court of Louisiana went so far in its opinion as to declare:

> "That such contracts cannot be enforced has been held in very many opinions of this Court and its predecessors, is evidenced by the following casses (citing authorities).

> "But, however much we may reprobate such scandalous transactions; however much we may feel constrained, for decency's sake, to summarily eject the plaintiff from the portals of the temple of justice, it is our deliberate opinion that it cannot be done in the present attitude of this affair."

Notwithstanding the intrinsic illegality of the contract, the Court, under Article 3071 of the Civil Code, upheld the transaction or compromise between the parties relative to the subject-matter of the litigation, holding that the only essential as a matter of form, which that article requires, is that the contract of compromise must be reduced to writing.

An analogous rule is laid down in *Calhoun vs. Lane,* 39 La. An. 594, 599, where the Court upholds a compromise between two forced heirs to the succession of their mother, which had the effect of binding a married woman's property for the debt of her husband. The Court said:

> "It cannot be contested that a married woman has the right to compromise a lawsuit against herself, or to make a transaction for the purpose of preventing a lawsuit against herself; and transactions have between the parties a force equal to the authority of things adjudged."

Oglesby vs. Attrill, 105 U. S. 605, was a writ of error to the Circuit Court of the United States for the District of Louisiana. It was sought by defendants to enforce a reconventional demand or counterclaim against plaintiffs, because of the fraud of plaintiff and his associates in causing assessments to be levied on corporate shares owned by defendants, whereby such shares were lost. It appeared, however,

that the parties had entered into a compromise in substantial accordance with Article 3071 of the Civil Code of Louisiana. It is said by Mr. Justice Field, in the opinion of the Court (pp. 610-611):

> "The suits between the defendants and the Crescent City company involved the validity of the assessment which they, on account 'of frauds and machinations of the officers,' sought to enjoin, whilst the company sought to enforce its payment. The compromise concluded embraced the dismissal of the several suits—of those brought against the defendants, and the one brought by them against the company—the transfer of their stock, and their release from present and future assessments thereon. There is no averment that it was induced by any false representations of the plaintiff or of the directors, or that the assessment was not a genuine one, or that the agreement of the directors that no assessment should be levied on their stock was carried into effect; or that there was any concealment of the affairs of the company; and of the value of the stock the defendants were as competent to judge as any others in the market. * * * The compromise stands, therefore, as a judgment, making a settlement of the very matters now set up as grounds of complaint in the petition in reconvention; that is, 'the frauds and machinations of the officers of the company' in levying the assessment. It settled all claims arising from the assessment, and the alleged fraudulent purposes of the officers in connection with it. Though made directly between the company and the defendants, it protects from further suit those who advised, equally with those who levied, the assessment; participants in whatever wrong was committed, if any there were, as well as principals; abettors as well as doers of it. **No allegations of fraud, in addition to those made at the settlement, can**

> **prevent the compromise from having effect as a judgment thereon.** It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally. (*Adle vs. Prudhomme*, 16 La. An. 343.) In the face of the compromise, the reconventional demand cannot be sustained."

From the foregoing authorities it results that it is not against the public policy of the State of Louisiana to compromise a suit in which the issue of fraud *vel non* is involved. As we have already seen, the Levee Board, as respects the lands in controversy, was possessed of the power to alienate without limit. An unlimited power to sell necessarily involves the power to compromise a suit with respect to the lands. The greater includes the less.

The Attorney General insists (petition, p. 25) that the compromise is to be treated as a sale of the lands, and that it is irregular because the lands were not duly sold to the highest bidder for cash under Act No. 215 of the General Assembly of Louisiana of 1908. There is no merit in this contention. The lands, when sold in November, 1898, were exposed at public sale to the highest bidder. In July, 1913, when the act of compromise was made, the Levee Board did not assume to sell the lands, but merely to compromise a litigation which involved the mere possible right to recover the same.

An argument like that now made by the Attorney General was addressed to the Court in *Calhoun vs. Lane*, 39 La. An. 594, 599. The Court said:

> "Assuming the agreement to be a sale and not a compromise, defendant's counsel further argues that it is void, for the reason that a married woman is not

> permitted to purchase property on terms of credit on her separate account, unless she is possessed of adequate means to discharge her obligations from her own resources.
>
> "While that is true as a general proposition, the principle is not properly invoked here. We have already ascertained that the agreement is not a sale; but it is one which a **previously** existing title of defendant is recognized and affirmed."

Neither is there merit in the suggestion that a different rule should apply because the Levee Board is a public body, a municipal corporation. No such distinction exists upon either reason or authority. From time immemorial the Government, as well as municipal corporations, have been wont to compromise embezzlements and other frauds of public officers. When such compromise is confined to the civil liability, the power or propriety of the act has not been questioned in courts of justice.

In *United States vs. Knabe* (C. C.), 147 Fed. 802, a compromise was made with the sureties on the bonds of certain defaulting officers of the United States. The Court said (p. 806):

> "The law favors compromises and settlement of disputed property and pecuniary rights, as well where the Government is a party as where the litigation is solely between private individuals. When propositions of compromise of such disputes are made to the Government and accepted by it, the Courts will apply the same rules for ascertaining their meaning as govern in construing like contracts between man and man."

As we have seen, the correctness of this rule as applied to lands claimed to have been acquired from a State or municipal body by fraud is distinctly recognized in the case in 119th Louisiana above cited.

XI.

The Land Company Paid $100,000 as a Consideration For the Compromise, and In No Event Could That Compromise Be Rescinded, Because the Moneys So Paid Have Not Been Restored.

There is no suggestion by the Attorney General that the State or the Levee Board, or anybody else, intends to refund or will refund the money paid by the Land Company as the consideration of the act of compromise. On the contrary, the moneys have been covered into the State Treasury and passed to the credit of the Tensas Basin Levee District and applied to the uses of the Levee Board. Not only does the Levee Board express no intent to refund the $100,000 received by it, but it declares its wish to retain the money and to stand upon the compromise into which it entered.

To carry on the suit (if that be allowed) is to rescind the compromise without restoring the consideration. This it would be against conscience for the Levee Board to do, and hence it would not be permitted. If the Levee Board would not be permitted thus to repudiate or rescind the compromise, another will not be allowed to do so in its behalf.

It is a familiar rule that a person who enters into a contract and afterwards seeks to avoid the effect of the contract on any ground that entitles him to rescind it, must first

restore what he has received and place the other party in *statu quo.*

> *Grymes vs. Sanders,* 93 U. S. 55, 62; *McLean vs. Clapp,* 141 *Id.* 429; *Ward vs. Sherman,* 192 *Id.* 168, 177; *Cook vs. Fidelity & Deposit Co.* (C. C. A.), 167 Fed. 95, 101; *Hill vs. Northern Pacific Railway Co.* (C. C. A.), 113 *Id.* 914, 917-918; *Ackerman vs. McShane,* 43 La. An. 507; *Althoff vs. Transit Co.,* 204 Mo. 166.

It must be borne in mind that this sum of $100,000 was received by the Levee Board pursuant to the last contract entered into between the parties to the suit—viz., the act of compromise. Upon elemental principles complainant cannot procure a decree in its favor until or unless that act of compromise be first set aside. To allow the act of compromise to be set aside and the litigation to proceed, and at the same time permit the Levee Board to retain the $100,000 which it secured only on the express condition that it release all claim to the lands in suit, would be to sanction the perpetration of a fraud.

It is, therefore, perceived that before the complainant, or anyone in its behalf, may prevail in the suit and recover the lands, the right of the complainant to rescind **two** contracts must be shown; **first,** the original contract of sale of November 9, 1898; **second,** the act of compromise of July 11, 1913.

The act of compromise or settlement is a **new** contract, and no right to rescind it is shown. The language of the Court in *McLean vs. Clapp,* 141 U. S. 429, 432, is applicable:

> **"The settlement was a new contract** between him and Clapp **and the law is clear that he cannot**

> **take the benefits of that contract and repudiate its burdens.** * * * Now, if he desired to rescind his contract, his duty was at once to return what he had received and repudiate wholly and forever the transaction. So far from doing this he did exactly the contrary; he retained all the notes and securities received under the settlement and has never yet returned one of them.
>
> "Were this all that appeared in the case, there would be nothing rising to the dignity of a question."

In *Ackerman vs. McShane*, 43 La. Ann. 507, in order to settle the affairs of a partnership, the plaintiff and defendant entered into a compromise in which plaintiff received $20,000 in cash, in full satisfaction and settlement of the interest of the testator in the partnership. A short time after the compromise was consummated plaintiff brought suit for an additional amount of $9,000, charging that the defendant, a surviving partner, had made untrue statements and had committed frauds in the settlement. The plaintiff did not allege that she made a tender of the amount received by her as one of the parties to the compromise, but instead she proposed to supplement the amount received to a sum equal to the alleged value of the property. In the opinion of the Court it is said:

> "The defrauded party, if defrauded, cannot be restored to his original rights in the manner proposed. Good pleading and regularity, which should characterize legal proceedings, require that in suits of this nature the party shall resort to an action in rescission, and that the amount received shall be tendered or deposited. In all such actions the parties seeking relief must first offer to restore his adversary to the situation he was in before the contract.
>
> "As long as the plaintiff retains the consideration and does not offer to return the amount received, he is estopped."

In *Hill vs. Northern Pacific Railway Co.* (C. C. A.), 113 Fed. 914, 918, a release was executed to a railway company for a claim for personal injuries. Afterwards suit was brought to recover for the injuries, and it was sought to avoid the settlement as obtained by false and fraudulent representations. The Court quoted with approval the following statement of the law:

> "'But there is another insurmountable obstacle in the complainant's way upon this feature of the case, that is, although she desires to set aside the contract of release, she still retains the consideration and has never offered to return it. Where a party attempts to rescind a contract, the rescission must be complete. He cannot affirm it in part and reject it in part. Common honesty would require him seeking to escape the burdens of the contract to return the benefits which he has received. This is not only a rule of common honesty and fairness, but has been recognized by the Courts from time immemorial.'"

So, also, in *Cook vs. Fidelity & Deposit Co.*, 167 Fed. 101 (C. C. A.), an attack was made upon a settlement for fraud. It is said by the Court :

> "And even if it should be conceded that in this action at law the plaintiff in error was entitled to show, if he could, that the agreements entered into subsequent to August 15, 1905, were executed by reason of fraud or misrepresentations, still upon the most obvious principles of right he could not avoid them while retaining the money and other property received by him by virtue of their execution."

When this cause was before the Court on demurrer (*Board of Levee Commissioners vs. Tensas Delta Land*

Company, 204 Fed. 736, 741), it was held that, inasmuch as the bill of complaint alleged that moneys in excess of the original purchase price had been received by the Land Company from the sales of lands, it was not necessary for complainant in its bill to tender to defendant Land Company the $130,000 originally paid for the lands, because the Court could probably adjust the equities between the parties. Clearly the principle there enunciated has no application here. The sum of $100,000 to which we now advert was not received by the Levee Board under the contract of sale made in November, 1898, but was paid to secure the compromise of disputed claims.

There was a *bona fide* dispute between the parties respecting the claims made by the Levee Board in its bill. The Land Company insisted that those claims were wholly false. These disputed claims of the respective parties were made the subject of compromise. It is well settled, as said in *Fire Insurance Association vs. Wickham*, 141 U. S. 564, 577, that

> "If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum in satisfaction of the entire claim."

This compromise of a disputed claim constitutes, as we have seen, **"a new contract"** between the parties. Because of that new contract the Land Company parted with $100,000 in cash. These moneys have never been restored, nor is any offer made to restore the same, and hence "the law is clear," as said by the Supreme Court of the United States in *McLean vs. Clapp, supra*, that complainant "cannot take the benefits of that contract and repudiate its burdens."

The State of Louisiana created this Levee Board for the express purpose of receiving, administering and disposing of the swamp lands and tax-title lands within the district and applying the proceeds for the benefit of the inhabitants of the district, in manner as provided in the act. The disposition of the lands, and likewise the disposition of suits or proceedings respecting the same, are confided by legislative enactment to the discretion of that body. It is a body composed of representative citizens residing in the eight parishes composing the district. They are men of character and standing in their respective communities. Presumably they are familiar with the value of the lands and know the interests of their constituents, and are competent to act in furtherance thereof.

After much deliberation, and in the exercise of their best judgment, the members of this Levee Board have seen fit to compromise a pending litigation respecting these lands, the success or failure of which depends not upon a mere question of law, but upon their ability or inability to establish facts claimed in their bill. The Honorable Attorney General, while not questioning their good faith, denies their legal right to decide matters expressly confided by legislative act to their discretion. He insists, apparently, that under some rule of law, hitherto unheard of, they have no power to do aught but prosecute the litigation to a conclusion, even though it be manifestly to the advantage of the inhabitants of the Levee District to compromise the same.

If these pretensions of the law officer of the State are well founded, the same may be exercised in the case of every municipal corporation or board in the State of Louisiana, and no longer will there be local self-government in that State, and the powers of all those local bodies may no longer

be employed according to the best judgment of the members composing the same, but only as the paramount and superintending authority of the Attorney General may determine. There is no warrant in the laws of Louisiana for such claims.

XII.

We again call attention to the fact that the Attorney General does not in any manner attack the compromise made by the Levee Board on July 11th, 1913, except to assert that it was a compromise of a fraud. He does not impugn the good faith, or business judgment, or the conduct of the members of the Levee Board. He was not the Attorney General who brought either the original suit by the State, or the suit by the Levee Board. This was done by his predecessor in office, Hon. Walter Guion. Having inherited it, he evidently regards it as an heirloom.

XIII.

The claim of the Attorney General that Act No. 3 of the extra session of 1910, quoted in full above, took away from the Levee Board—and consequently every political agency or subdivision in the State—all control over cases involving title to land is without any foundation. The act does not make any such provision. It would be a very broad stretching of that statute to say that if repealed those parts of the special charter of every municipal corporation and Levee Board in the State which give them power to sue and be sued, to hold and dispose of lands, and to exercise their corporate discretion and judgment in all matters within their corporate powers.

The act simply makes the Attorney General, whenever so instructed by the Governor, act as the counsel for the State and its sub-divisions. It does not make him as counsel for the State or one of its sub-divisions in a land case the master of either the State or of its sub-divisions, with power to veto any action the State or its subdivisions may take looking to an adjustment, settlement or compromise of the litigation.

Respectfully submitted,

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